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No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (ALABAMA), UNR-ROHN, INC. (INDIANA), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., LEAVITT STRUCTURAL TUBING CO., and FOLDING CARRIER CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This petition is to review the Seventh Circuit's decision that a bankruptcy order confirming a plan of reorganization, in which the value of tort claims was estimated, is binding on an insurer/non-creditor. Under the Bankruptcy Code, the bankruptcy court can estimate the value of such claims to determine if reorganization is feasible, but cannot liquidate them. The pre-petition, state-law insurance coverage action between the debtor and petitioner was withdrawn by the district court since no party consented to bankruptcy jurisdiction. In the reorganization plan, the debtor reserved the right to litigate with and retain any recovery from the insurers as a condition precedent to confirmation of the plan. The following questions are presented.

1. If the confirmation order is held to be binding where the insurance dispute was withdrawn to the district court and there was no consent to bankruptcy jurisdiction, does such a holding violate Article III?

2. Does the Bankruptcy Code permit a bankruptcy court to issue final, binding decisions affecting the liability of non-creditor for a debt owed by the debtor?

3. Was the notice given to the non-creditor adequate for preclusion principles as required by the due process clause where the plan provided that the insurance action would be retained by the newly-reorganized debtor?

4. Whether preclusion principles apply where the parties to the bankruptcy proceedings agreed on a formula by which the value of the tort claims was estimated and the bankruptcy court considered that estimate in confirming the plan of reorganization?

5. Whether there is a present case or controversy where state law requires a case-by-case showing that a claim is covered by an insurance policy and no claim has been identified, nor has any judgment been entered nor settlement been reached which is binding on the insurer?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Continental Casualty Company[1] respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 29, 1991 and denial of rehearing on October 3, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported as *UNR Indus., Inc. v. Continental Casualty Co.*, 942 F.2d 1101 (7th Cir. 1991) and is reprinted in the separate appendix, p. 1a. Its denial of the petition for rehearing is reprinted in the appendix, p. 18a.

[1] Petitioner's Rule 29.1 statement provided in its application for extension of time is current.

The memorandum decision of the United States District Court for the Northern District of Illinois, Eastern Division reviewed by the Seventh Circuit was not reported. It is reprinted in the appendix, p. 19a. The judgment entered by the district court on April 30, 1990 is reprinted in the appendix, p. 26a. The amended judgment entered on May 21, 1990 is reprinted in the appendix, p. 29a.

Related memorandum decisions of the district court in *UNR Indus., Inc. v. Continental Ins. Co.* were reported at: 682 F.Supp. 1434 (N.D. Ill. 1988) ("Phase I"); 623 F.Supp. 1319 (N.D. Ill. 1985); 607 F.Supp. 855 (N.D. Ill. 1984); and 101 B.R. 524 (N.D. Ill. 1989). Other decisions were not reported and are reprinted in the appendix. The decision entered on November 8, 1988 ("Phase II") is at p. 33a. The January 10, 1989 order is reprinted at p. 65a. Decisions in the bankruptcy proceedings, *In re UNR Indus., Inc.*, were reported at 74 B.R. 146 (Bkrtcy N.D. Ill. 1987) and 45 B.R. 322 (Bkrtcy N.D. Ill. 1984). The bankruptcy court's order confirming the reorganization plan entered June 30, 1990 was not reported and is reprinted in the appendix, p. 74a.

STATEMENT OF JURISDICTION

The Seventh Circuit decided this case on August 29, 1991 (App. 1a). The petition for rehearing and suggestions for rehearing en banc was denied on October 3, 1991 (App. 18a). Petitioner's application for an extension of time until February 12, 1992 was granted by this Court's order of December 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTORY AND OTHER AUTHORITIES

Sections 1 and 2 of Article III of the U.S. Constitution are reprinted in the appendix, p. 98a. The Fifth Amendment is reprinted in the appendix, p. 98a. Pertinent sections 28 U.S.C. §1334 are reprinted in the appendix, p. 98a. Pertinent sections of 28 U.S.C. §157 are reprinted at p. 99a. Pertinent sections of 11 U.S.C. §1123 and §524(e) are reprinted in the appendix, pp. 100-01a. Bankruptcy Rule 7012(b) is reprinted in part in the appendix, p. 101a.

STATEMENT UNDER RULE 29.4(B)

Since this petition draws into question the constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. §2403(a) may be applicable. No court of the United States as defined by 28 U.S.C. §451 has, pursuant to 28 U.S.C. §2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

STATEMENT OF THE CASE

UNR Industries, Inc. is the successor of various companies (collectively "UNR") which, from 1918 until April 1970, manufactured asbestos-containing products (App. 78a). When asbestos fibers are inhaled, they may cause certain diseases which do not usually manifest until many years after exposure (App. 78a). In 1962, UNR discontinued the production of "substantially all of its asbestos products" when it sold its major product line (App. 78a). Minor amounts of UNR asbestos products were sold through the 1960's and discontinued on April 1, 1970, when its last plant and all inventory were sold (App. 20a, 72a, 78a).

UNR's Insurance Coverage, Asbestos Claims and Houston Agreements

UNR purchased primary, comprehensive general liability insurance from various insurers. Starting November 1, 1970 until 1981, it purchased primary insurance from Continental Insurance Company ("Continental" or "the primary insurer"), with annual policy limits of $500,000. Per occurrence deductibles were later added (App. 20a, Doc. 2055 (UNR Memo.) Exh. 3).[2]

UNR bought one excess policy from petitioner CNA which indemnified UNR for loss in excess of the limits of Continental's

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[2] Continental Insurance Company ("Continental") is not related to Continental Casualty Company, which is referred to herein as "CNA" (Doc. 1449 p.1).

primary insurance.[3] It was in effect for the first three years of Continental's policy, and eight years after UNR was virtually out of the asbestos business and seven months after the last product line and all inventory was sold (App. 20a, 78a, Doc. 2055 (UNR SJ Memo.) Exh. 3).

Beginning in the late 1960's, UNR and other asbestos manufacturers were sued by workers who claimed to be injured by exposure to asbestos (App. 71a, 79a). Through 1975, two years after CNA's policy period expired, only 97 suits had been filed against UNR. After 1975, the number of claims doubled or tripled from year to year (App. 71a).

UNR believed that it was uninsured until 1958. *UNR Indus., Inc. v. Continental Ins. Co.*, 682 F.Supp. 1434, 1440 (N.D. Ill. 1988). When UNR was first sued by asbestos claimants, it submitted the claims to its primary insurers. As the number of asbestos suits increased, UNR's attorney recommended that UNR avoid coverage litigation with its primary insurers because of the extended period it was uninsured. In 1976, UNR entered into an agreement with each of its primary insurers, referred to as the "Houston Agreements" ("Agreements"). CNA and the other excess insurers were never parties to the Agreements, and objected because they required an improper, arbitrary allocation of claims among UNR and the primary insurers (Sup.Rec.Vol.

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[3] "Loss" was defined as "sums paid as damages in settlement of a claim or in satisfaction of a judgment for which the insured is legally liable, after making deductions for all recoveries, salvages and other insurances (whether recoverable or not) (Doc. 2050 (UNR SJ Mot.) Exh. 1, p. 4).

The conditions required UNR to give CNA notice of any claim. UNR agreed to cooperate with and assist CNA in settlements, and also agreed that it "shall not, except at [its] own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident."

The conditions also contained a "no action" clause, which precluded actions against CNA if either of two criteria were not met. First, UNR had to fully comply with all the policy terms and, second, "the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured or by written agreement of the insured [UNR], the claimant and the company [CNA]" (Doc. 2050 (UNR SJ Mot.) Exh. 1 p. 5 ¶¶6,7).

14 #69 Tabs 71, 83).[4] *UNR*, 682 F.Supp. at 1444-45, 1450-51. UNR was aware at the time that the Agreements created problems with its excess policies. *Id.* at 1450-51. The Agreements provided that if a plaintiff claimed to be exposed to UNR products during a year when a primary insurer's policy was in effect, that insurer would contribute a fixed percentage of the costs, regardless of what the ultimate evidence established (Sup.Rec.Vol. 14 #69 Tab 71 p. 3). *Id.* at 1441.

As claims were asserted against UNR, they were paid according to the Agreements.[5] UNR never claimed that its primary insurance below CNA's excess policy was exhausted. As UNR explained to CNA in 1978, "no claim has resulted in an obligation by Continental" in excess of the per occurrence deductible, with the result that other insurers and UNR paid all the claims under the Agreements (Sup.Rec.Vol. 14 #69 Tab 71 p. 3).

Insurance Disputes Commence in State Court and UNR's Reorganization

UNR cancelled the Agreements in December 1981 (App. 39a). CNA and other insurers filed a declaratory judgment action on the coverage issues in state court (App. 79a). UNR subsequently filed a chapter 11 petition in the bankruptcy court, and the state actions were stayed (App. 79a). UNR and some of its insurers filed adversary complaints in the bankruptcy court. *UNR*, 682 F.Supp. at 1438. CNA did not file an adversary claim or counterclaim, but was named as a defendant by UNR in its adversary complaint. Neither UNR nor the insurers consented to the bankruptcy court's jurisdiction. *UNR Indus., Inc. v. Continental Ins. Co.*, 623 F.Supp. 1319, 1333 n. 9 (N.D. Ill. 1985). The insurance disputes were withdrawn by the district court in 1983 (Dkt. 356). *UNR Indus., Inc. v. Continental Ins. Co.*, 607

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[4] On appeal to the Seventh Circuit, the parties filed a supplemental record by agreement, cited to herein as "Sup. Rec."

[5] The terms of the Agreements were established by a jury. For claims asserted before 12/31/75, Continental was to contribute 15%. For those asserted in 1976, it was to contribute 50%, subject to a $15,000/year deductible and, from 1977-79, it was obligated for 50% subject to a $30,000/year deductible. For claims asserted in 1980-81, Continental's portion was 40%, again subject to its deductibles. *UNR*, 682 F.2d at 1441.

F.Supp. 855, 858 (N.D. Ill. 1984). The district court found that the insurance disputes between the debtor/insured and non-creditors/insurers were "related," not "core" proceedings. *UNR*, 623 F.Supp. at 1332.

The district court ordered that the case be tried in phases. In Phase I, the jury found that the Houston Agreements between UNR and its primary insurers were binding and enforceable. It also determined the terms of the Agreements (*supra*, p. 5 n. 5). The district court entered a declaratory judgment applying the jury's findings. 682 F.Supp. at 1461-63.

A second declaratory judgment decided the effect of the Agreements on the excess policies ("Phase II") (App. 33-70a). The court held that although UNR had terminated the Agreements, the primary insurers' policies, which were in effect before the Agreements, were still binding (App. 39a). Therefore, Continental, the primary insurer below CNA, had to pay its unexhausted policy limits to indemnify for claims which occurred during CNA's three-year policy period (App. 40-42a). Under Illinois law, as established in *Zurich Ins. Co. v. Raymark Indus., Inc.*, 118 Ill.2d 23, 514 N.E.2d 150, 161 (1987), a claim occurs during a policy period if there is actual exposure to an insured's product or manifestation of a sickness or disease as shown on a case-by-case basis, or a "double trigger" for coverage (App. 53a).

Applying *Zurich*, the district court held that coverage is not triggered during periods after exposure ends, but before sickness or disease, i.e., "exposure in residence" (App. 53a). If a primary insurer made payments under the Agreements "solely on the basis of liability for injury during the period between exposure and manifestation," those payments could not apply toward exhaustion of the primary coverage (App. 53a). Continental still had unpaid primary insurance limits available to satisfy claims which occurred during CNA's policy period (App. 42a, 48a). After Phase II, UNR settled with its insurers, except CNA. *UNR Indus., Inc. v. Continental Ins. Co.*, 101 B.R. 524, 525 (N.D.Ill. 1989).

Plan of Reorganization and Claims Facility Procedures

In the bankruptcy court, UNR submitted a disclosure statement and a proposed plan of reorganization, the terms of which it had negotiated with the creditor committees (App. 77-97a). UNR explained that there were claimants who alleged injury due to asbestos exposure, but they had not been determined to be valid (App. 95a). UNR explained that it was "impossible to predict with any certainty the number, liquidated value or time of assertion" of the asbestos claims (App. 83a). However, a company had been retained to estimate the approximate value of the asbestos claims (App. 84a). After "intense and protracted negotiations" among UNR, creditor committees and attorneys, a formula was agreed upon to arrive at a dollar amount of the value of present and future asbestos claims (App. 85a). The debtor and creditor committees agreed on these terms of the proposed reorganization plan (App. 85a).

The plan proposed the transfer of a majority of the stock of the reorganized company into a trust which, in turn, would create a claims facility for determination of the validity of asbestos claims (App. 83a). Valuation of the claims was to "be based upon values established in the tort system considering all relevant factors" (App. 92a). The facility was to liquidate the claims. It could disallow invalid claims and, if valid, claims were to be paid by the trust (App. 84a, 95a).[6] After all claims were disallowed or allowed and paid, any remaining trust assets were to go to charitable purposes (App. 93a).

As a condition precedent to the plan's confirmation, the plan required that all insurance proceeds recovered would be assets of post-bankruptcy UNR ("new UNR"), which reserved

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[6] Each claimant had three options, all three of which required the claimant to demonstrate exposure to a UNR asbestos-containing product and to provide a medical report containing a diagnosis of an asbestos-related disease or injury (App. 92-93a, 95-97a). The third permitted a claimant to submit to alternative dispute resolution and, if not settled, file suit against the trust and have a jury trial to set the value of the claim (App. 96-97a). If tried, all defenses would be available to UNR (App. 97a). For example, UNR asserted an immunity defense for all claims based on products installed in ships for the government. *In re UNR Indus., Inc.*, 74 B.R. 146 (Bkrtcy N.D. Ill. 1987).

the right to continue to litigate the pending insurance disputes (App. 86-87a, 89-91a). The bankruptcy court approved the plan on June 1, 1989 (App. 74-76a).

Cross Motions for Summary Judgment

CNA moved for summary judgment on the basis of the district court's prior declaratory judgments. One basis of the motion was that UNR, to date, had not identified any covered claims (i.e., in which there had been exposure and/or manifestation during CNA's policy period), which exhausted the primary coverage and triggered CNA's excess policy (Doc. 2048 (CNA SJ Mot.); Doc. 2079 (Affid.) pp. 2-3). A case-by-case examination of UNR's existing files by CNA did not establish exhaustion of UNR's primary insurance (Doc. 2079 (Affid.)).

UNR filed two motions for summary judgment. It sought a declaration that its transfer of stock to the trust which would determine the validity of the asbestos claims represented "a legal obligation imposed on UNR that triggers defendants' obligations to reimburse UNR" (Doc. 2050 (UNR SJ Mot.) pp. 4-5). It also sought a declaration regarding the burden of proof (Doc. 2049 (UNR SJ Mot.)). In opposition to CNA's motion, UNR relied on a statistical study which estimated the number and value of present and future tort claims. This study projected that all tort claims would exceed the total of all insurance policies (Doc. 2059 (UNR Reply Memo.) Exh. 2).

District Court Enters Summary Judgment

The district court granted CNA's motion for summary judgment and denied UNR's (App. 19-25a). It held that there was no present controversy before it because, under the unambiguous terms of CNA's policy, UNR had to establish exhaustion of the primary insurance by covered claims before CNA's excess obligations were triggered (App. 23a). UNR's settlement with Continental did not automatically exhaust the primary limits underlying CNA's policy because no claims had yet been identified by UNR (App. 22a). Because UNR had not identified any claims which reached CNA's excess policy, CNA had no present liability (App. 23a).

The district denied both of UNR's motions (App. 23-24a). The bankruptcy court's order of confirmation, approving the reorganization plan, was not a "judgment" within the meaning of the CNA policy (App. 24a). The documents filed by CNA with the court suggested that the claims falling within CNA's policy period would be satisfied out of UNR's primary coverage (App. 24- 25a). Therefore, the district court found no present basis for granting further declaratory relief (App. 25a).

Seventh Circuit Reverses

The Seventh Circuit reversed (App. 1-17a). It held that the insurance dispute was "related" to the bankruptcy, and the district court had jurisdiction under 28 U.S.C. §1334(b) (App. 2a).

It found that UNR sustained a loss because "UNR's bankruptcy resulted in a judgment or settlement (which one does not matter)" of the asbestos claims thus triggering CNA's obligations under its indemnification policy (App. 4-5a). It first stated that a settlement would not normally be binding on CNA because it was not a party to the bankruptcy proceedings (App. 6a). Here, however, CNA had notice of the bankruptcy proceeding, had not objected to the plan nor appealed the confirmation order (App. 6a). The Seventh Circuit found that the bankruptcy court's order confirming the reorganization plan, in which the value of the tort claims was estimated, was binding on CNA (App. 5a). "The order confirming that reorganization was final and appealable. And the order is binding. The parties may not relitigate the matter" (App. 5a). CNA had waived any rights under the policy provision which precluded an insured from settling without CNA's written consent (App. 6a).

The court agreed that CNA was not liable unless a claim was covered under the policy during CNA's policy period (App. 11a). It affirmed the district court's interpretation of the holding of the Illinois Supreme Court in *Zurich Ins. Co. v. Raymark Indus., Inc.*, 118 Ill.2d 23, 514 N.E.2d 150 (1987) that Illinois recognized a double trigger for insurance coverage "in all respects" (App. 9a n. 9). It stated that the district court, in holding that the amount of claims had to be shown on a case-by-case basis under state law "may be right," but that the district court had "prejudged" this issue (App. 10a).

The Seventh Circuit then calculated the "real value" of the claims by applying the formula negotiated between the debtor and creditor committees. It calculated that estimated value of tort claims contained in the proposed plan was $254 million in "real value" (App. 6a).[7] The district court had to determine "how much of the $254 million value of all of the asbestos claims is allocable to each year of CNA's policy period" (App. 11a). It acknowledged that CNA was only responsible for the amount of this allocation which exceeded the primary limits in any year, subject to the policy limits (App. 11a).

REASONS FOR GRANTING THE WRIT

In recent years, some companies have faced either enormous verdicts or mass tort suits filed by hundreds or thousands of claimants. More and more frequently, these same companies have sought the protections afforded by the Bankruptcy Code. *See, e.g., Tringali v. Hathaway Mach. Co.*, 796 F.2d 553 (1st Cir. 1986); *A.H. Robins, Co. v. Piccinin*, 788 F.2d 994, 996 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986) (production of the Dalkon Shield created an "avalanche of actions"); *In re Celotex Corp.*, 128 B.R. 478 (Bkrtcy M.D. Fla. 1991); *In re Johns-Manville Corp.*, 40 B.R. 219, 221 (S.D.N.Y. 1984) (asbestos manufacturer faced a "litigation explosion" of personal injury suits). *See also In re Raymark Indus., Inc.*, 99 B.R. 298 (E.D. Penn. 1989) (involuntary chapter 11 petition filed by asbestos claimants).

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[7] The disclosure statement explained that UNR retained an actuarial firm, Towers, Perrin, Forster & Crosby ("Towers") to study "the feasibility of estimating UNR's liability for asbestos-related claims." The Towers report "indicated that sufficient information existed to estimate a range of likely total claim costs for then existing as well as future asbestos-related claims" (Doc. 2050 (UNR Memo.) Exh. 1 (Discl. Stmt) p. 3). UNR and the creditor committees, which included the present and future asbestos claimants, as well as trade and other unsecured claimants, negotiated a formula to divide the stock according to the classes of creditors (App. 85a). About 63% of the stock would go to asbestos claimants, if the asbestos property claims were not allowed (App. 83a). Assuming that the value of the stock were $150 million, 63% would be $94.5 million that UNR would actually pay to settle the asbestos claimants, reduced by the share to go to the asbestos property claims (App. 85a). Since this insurance dispute was withdrawn from the bankruptcy court, this record does not show whether the asbestos property damage claims were ever allowed.

These tort suits also result in the filing of declaratory judgment actions against the insurers of the bankrupt companies. *See UNR Indus., Inc. v. Continental Ins. Co.*, 682 F.Supp. 1434, 1448-49 (N.D. Ill. 1988) (collecting cases).[8] The insurance policies which indemnify for tort liability can be "the most important asset" of those companies. *A.H. Robins*, 788 F.2d at 1001, *citing In re Johns-Manville Corp.*, 33 B.R. 254, 261 (Bkrtcy S.D.N.Y. 1983).

The issues in this case arise from the interaction of the debtor/insurer (or debtor/non-creditor) relationship, Article III, the Due Process Clause and the Bankruptcy Code. The Seventh Circuit held that the bankruptcy order confirming the reorganization plan was binding on the insurer. The plan estimated the value of present and future tort asbestos claims. However, the pre-petition insurance dispute was originally filed in state court. After the chapter 11 petition was filed, adversary claims over the insurance disputes were brought and withdrawn from the bankruptcy court by the district court. CNA was not a creditor nor had it filed an adversary proceeding or counterclaim in the bankruptcy court. It did not consent to the jurisdiction of the bankruptcy court.

The question presented is what effect does the estimation of the value of tort claims by a bankruptcy court in confirming a consensual plan of reorganization have on a pre-petition state law contract claim previously withdrawn to the district court? This Court should allow this Petition to determine this important question and resolve conflicts among the circuits.

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[8] In turn, there is an insurance crisis which has been attributed to the number of tort claims and size of verdicts. *See* Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521, 1532-39 (1987), *citing* U.S. Dep't of Justice, *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordibility* (1986).

I. IS A FINDING THAT A BANKRUPTCY COURT'S ESTIMATION OF THE VALUE OF TORT CLAIMS IS BINDING CONTRARY TO THE BANKRUPTCY CODE AND UNCONSTITUTIONAL?

A. Can Any Preclusive Effect Be Given to a Bankruptcy Court Order Under Article III After the District Court Withdraws a Pre-Petition State Law Claim?

In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982), this Court held that the Bankruptcy Act of 1978 violated Article III because jurisdiction over all civil proceedings related to or arising in cases under title 11 was vested in non-Article III bankruptcy courts. Article III precluded Congress from vesting bankruptcy courts with the judicial power to issue binding and enforceable final judgments. *Id.* at 85-86. "[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case." *Id.* at 71. The Court later reiterated its holding:

> Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under the state law, without consent of the litigants, and subject only to ordinary appellate review.

Thomas v. Union Carbide Agric. Prod. Co. 473 U.S. 568, 584 (1985).

After *Northern Pipeline*, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("1984 Act") in an attempt to cure this constitutional deficiency, segregating "core" and "non-core" proceedings for jurisdictional purposes. *In re Wolverine Radio Co.*, 930 F.2d 1132, 1143 n. 16 (6th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3267 (U.S. Sept. 13, 1991) (No. 91-497), *citing In re Wood*, 825 F.2d 90, 91-92 (5th Cir. 1987). Section 1334 of the 1984 Act provides that district courts have original but not exclusive jurisdiction of civil proceedings arising under, arising in or related to bankruptcy cases. 28 U.S.C.

§1334(b). Section 157 permits a district court to refer proceedings to the bankruptcy court and to withdraw them. 28 U.S.C.§§157(a) and (d).

Section 157(b)(2)(0) generally permits a bankruptcy court to conduct proceedings which affect the assets of the estate, but expressly exempts tort claims. 28 U.S.C. §157(b)(2)(0). The Code mandates that personal injury tort claims "shall be tried in the district court." 28 U.S.C. §157(b)(5). It also provides that a bankruptcy court may estimate claims or interests for the purpose of confirming a reorganization plan, "but not the liquidation or estimation of contingent or unliquidated personal injury or wrongful death claims against the estate for purposes of distribution." 28 U.S.C. §157(b)(2)(B).

In this case, after UNR filed for reorganization under chapter 11, the district court held that the pre-petition insurance disputes were not "core," but "non-core" or "related," proceedings. *UNR Indus., Inc. v. Continental Ins. Co.*, 623 F.Supp. 1319, 1332 (N.D.Ill. 1985). The Seventh Circuit concurred that they were "related" (App. 2a). The parties did not consent to the bankruptcy court's jurisdiction and the district court withdrew these actions. *Id.* at 1333 n. 9. In the reorganization proceeding, the debtor and creditor committees agreed to a plan of reorganization which estimated the value of present and future personal injury claims (App. 83-85a). The bankruptcy judge considered the estimated value for the purposes of confirming the plan, and entered a confirmation order (App. 74-76a).

The Seventh Circuit's decision that CNA, the debtor's insurer, was bound by the bankruptcy court's estimation of tort claims for the purpose of confirming the proposed reorganization plan conflicts with the Bankruptcy Code. It also raises a constitutional issue under Article III and this Court's holding in *Northern Pipeline*. The Seventh Circuit held that the order confirming the consensual plan was "final and appealable," and "binding" on CNA (App. 5a). If the constitutional deficiency in the 1978 Act was Congress' empowering bankruptcy courts to issue final judgments with respect to state-created private rights which are "binding and enforceable" (*Northern Pipeline*, 458 U.S. at 85-86), then the Seventh Circuit's decision interprets the Code in an unconstitutional manner.

This decision creates a split in the circuits on the question of whether a bankruptcy court's orders are binding on parties in a non-core action where the bankruptcy court lacked jurisdiction over that action. Here, the Seventh Circuit concluded that the insurer could be bound, notwithstanding the district court's withdrawal of the state-law action and §157 which precludes a bankruptcy court from estimating or liquidating tort claims for distribution. 28 U.S.C. §157(b)(2)(B).

The Fifth Circuit has come to an opposite result, holding there is no effect to a bankruptcy order where that court lacked jurisdiction. It held that "the preclusive effect of a bankruptcy decree must reflect the reality of its limited jurisdiction," and refused to accord any effect to a confirmation order because it would violate Article III, relying on *Northern Pipeline*. *Latham v. Wells Fargo Bank, N.A.*, 896 F.2d 979, 983-84 (5th Cir. 1990). *Accord Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 189 (5th Cir. 1990); *In re Marill Alarm Sys., Inc.*, 81 B.R. 119, 122 (S.D.Fla. 1987), *aff'd without op.*, 861 F.2d 725 (5th Cir. 1988) (bankruptcy court's final judgment invalid where it lacked jurisdiction under *Northern Pipeline* over state RICO claims). *See also In re Satelco, Inc.*, 58 B.R. 781, 789 (Bkrtcy N.D. Tex. 1986) (if §157 were read to permit a bankruptcy court to adjudicate state law claims, it would be "clearly unconstitutional").

In contrast to its decision here, the Seventh Circuit also has recognized that the findings of a bankruptcy court are not binding on non-core proceedings because the bankruptcy court lacks jurisdiction. In *Barnett v. Stern*, 909 F.2d 973, 979 (7th Cir. 1990), it held that a bankruptcy decree had no binding effect over a federal RICO action. In *Pettibone Corp. v. Easley*, 935 F.2d 120, 123 (7th Cir. 1991), the reorganization plan provided that the tort claims would be adjudicated in other courts. The Seventh Circuit held that the bankruptcy court lacked jurisdiction under Article III and *Northern Pipeline* to adjudicate defenses to those suits.

While unquestionably, a confirmed plan of reorganization binds the debtor and creditors, research has not revealed any case, except the Seventh Circuit here, which held that a confirmation order binds a debtor's debtor, or potential indemnitor. Section 524(e) provides that the "discharge of a debt of the debtor

does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. §524(e). Other courts have recognized that §524(e) prevents a bankruptcy court from entering orders which affect the liability of others for debts. *See Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985) and *United States v. Stribling Flying Serv., Inc.*, 734 F.2d 221, 223 (5th Cir. 1984) (guarantor's liability on debt unaffected by bankruptcy confirmation order). *See also In re Northwest Exploration Co.*, 71 B.R. 873, 879 (Bkrtcy N.D. Okla. 1987) (Article III, *Northern Pipeline* and the Code, "undeniably prohibit a bankruptcy debtor from using the Bankruptcy Courts to modify pre-petition contractual relationship with his *debtor*") (original emphasis). This is one reason why the district court withdrew this state-law insurance dispute and retained jurisdiction in the first place. *UNR*, 623 F.Supp. at 1332-33 ("claims (whether state-law or not) by the debtor against a non-creditor" are not core proceedings and, absent consent, the bankruptcy court lacks jurisdiction).

Here, the district court withdrew the state law action between the debtor and its insurer/non-creditor. This Court should accept this petition to decide the important question of whether a bankruptcy court has the jurisdiction under the Bankruptcy Code and Article III to issue final and enforceable orders which are binding on a non-creditor under these circumstances?

B. Can Consent or Waiver Vest Jurisdiction in a Court Which Lacks Subject Matter Jurisdiction Under Article III?

If a matter is related to the bankruptcy and referred to the bankruptcy court, then the bankruptcy judge submits proposed findings of fact and conclusions of law to the district court for *de novo* review. 28 U.S.C. §157(c)(1). However, with the parties' consent, the bankruptcy court may enter final orders and judgments in a case which is related to the bankruptcy. 28 U.S.C. §157(c)(2); *Wolverine Radio*, 930 F.2d at 1143-44. Bankruptcy Rule 7012(b) requires "express consent."

The Seventh Circuit held that CNA's failure to object to or appeal from the confirmation order resulted in a binding determination and a waiver of any objections even though the plan provided that the insurance litigation, previously withdrawn

to the district court, would continue. This then raises the question whether the failure to object or appeal may be held to be vest the bankruptcy court with jurisdiction.

The situation presented here must be distinguished from those situations where a party files an adversary proceeding or a proof of claim. In such cases, courts accord preclusive effect to the bankruptcy decree. This court recently held that by filing a proof of claim, a creditor may subject himself to summary disposition by the bankruptcy court and waive the personal right to a trial by jury, citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). *Langenkamp v. Culp*, 498 U.S. ___, 112 L.Ed.2d 343, 347-48 (1990), *reh'g denied*, 498 U.S. ___, 112 L.Ed 2d 709 (1991). Where debtors submit their claim in the bankruptcy court, those claims become "integral to the restructuring of the debtor-creditor relationship." *Id.*

Here, CNA did not file a proof of claim, because it was not a creditor, nor did it file an adversary complaint or counterclaim in the bankruptcy court. Even if it had, the insurance dispute was withdrawn to the district court. Yet, the Seventh Circuit found that CNA failed to object or participate in the bankruptcy proceedings and therefore the confirmation order was binding. This decision is in accord with some circuits, which have held that parties may impliedly consent by failing to object to the bankruptcy court's jurisdiction, and are therefore bound by the bankruptcy order. *United States, Dept. of Air Force v. Carolina Parachute Corp.*, 907 F.2d 1469, 1473 (4th Cir. 1990); *In re Men's Sportswear, Inc.*, 834 F.2d 1134, 1137-38 (2d Cir. 1987); *In re Daniels-Head & Assoc.*, 819 F.2d 914, 917-18 (9th Cir. 1987); *In re Southern Indus. Banking Corp.*, 809 F.2d 329, 331 (6th Cir. 1987). In such cases, core and non-core proceedings are the functional equivalent, and a bankruptcy court has jurisdiction to enter final, binding orders. *Daniels-Head*, 819 F.2d at 918.

The Fifth Circuit reached an opposite result and held that the failure to object does not vest a bankruptcy court with jurisdiction. *Latham v. Wells Fargo Bank N.A.*, 896 F.2d 979 (5th Cir. 1990) (bankruptcy confirmation order was not binding despite lack of objection and opportunity to participate). One circuit refused to give preclusive effect on the basis that consent to bankruptcy court jurisdiction cannot be implied, but must be

expressly given under Bankruptcy Rule 7012(b). *In re Brickell Inv. Corp.*, 922 F.2d 696, 702 (11th Cir. 1991); *In re Davis*, 899 F.2d 1136, 1142 (11th Cir.), *cert. denied sub nom, Gower v. Farmers Home Admin.*, 498 U.S. ___, 112 L.Ed.2d 522 (1990).

Even those courts which have found consent to be implied have recognized that there are constitutional constraints. Courts cannot "lightly infer from a litigant's conduct consent to have private state-created rights adjudicated by a non-Article III judge," because "to do so would violate the spirit of *Northern Pipeline.*" *Men's Sportswear*, 834 F.2d at 1137-38.

The parties' consent or waiver is not always dispositive of the question of jurisdiction. *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 850-51 (1986). The personal right to have an Article III court adjudicate a claim is subject to waiver by the parties. *Id.* at 848. However, Article III is integral to the "constitutional system of checks and balances" and prevents "the encroachment or aggrandizement of one branch at the expense of another." *Id.* at 850 (citations omitted).

> When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.

Id. at 851.

This Court should accept this petition to determine two issues which are raised. First, whether a party, which did not file a proof of claim or an adversary proceeding in the bankruptcy court, and did not consent to the jurisdiction of the bankruptcy court, can nevertheless be held to have impliedly consented to its jurisdiction or waived its rights to an adjudication by an Article III court and is bound to the estimated value of tort claims in a confirmation order by failing to object or appeal? Second, by giving a bankruptcy confirmation order binding effect when the district court had withdrawn the insurance action in which petitioner was a party, does this impermissibly encroach on the district court's Article III jurisdiction in violation of the Constitution?

C. Is a Bankruptcy Court a Court of Competent Jurisdiction for Preclusion and Estoppel Purposes?

Giving the bankruptcy confirmation order preclusive effect not only implicates Article III, but also the due process clause. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n. 7 (1979) (citations omitted). Before a judgment is conclusive, it must be rendered by a court of competent jurisdiction. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 702 (1982); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482-83, *reh'g denied*, 458 U.S. 1133 (1982).

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by *a court of competent jurisdiction* . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . .

Montana v. United States, 440 U.S. 147, 153 (1979); (citations omitted; emphasis added).

In *Katchen v. Landy*, 382 U.S. 323, 334 (1966) this Court held that "the normal rules of res judicata and collateral estoppel apply to the decisions of bankruptcy courts." However, as pointed out in *Northern Pipeline*, the *Katchen* decision did not involve an Article III challenge, nor did it address the competency of a bankruptcy court to issue binding decisions. 458 U.S. at 79 n. 31.

The question presented here is whether the bankruptcy court was a court of "competent jurisdiction" where the district court withdrew the insurance dispute and the bankruptcy court lacked jurisdiction to liquidate the tort claims for distribution. If it lacked jurisdiction, then its orders have no effect. *Georgia v. South Carolina*, 497 U.S. ___, 111 L.Ed.2d 309, 327 (1990) (circuit court decision had no effect where only the Supreme Court had jurisdiction); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 865 (1985) (no estoppel effect unless court has in personam jurisdiction); *In re Marill Alarm Sys., Inc.*, 81 B.R. 119, 122-23 (S.D.

Fla. 1987), *aff'd without op.*, 861 F.2d 725 (5th Cir. 1988) (bankruptcy order "invalid because it was rendered outside its jurisdiction"). This Court should accept this petition to determine whether, under Article III, the due process clause and the Bankruptcy Code, the bankruptcy court was a court of competent jurisdiction for preclusion and estoppel purposes.

II. WAS ADEQUATE NOTICE GIVEN TO THE INSURER WHERE THE PLAN PROVIDED THAT THE NEWLY-ORGANIZED COMPANY WAS RESERVING THE RIGHT TO CONTINUE TO LITIGATE THE INSURANCE DISPUTE WITH ITS EXCESS INSURER AND TO RETAIN ANY PROCEEDS UNDER THE DUE PROCESS CLAUSE?

The due process clause is a constitutional limitation in bankruptcy cases. *Thomas*, 473 U.S. at 592-93, 602 n. 5. Even if a person has actual knowledge of a pending bankruptcy, he is not bound by any bankruptcy orders if notice which is calculated to inform him that his rights may be impaired is not given. *New York v. New York, N.H. & H. R.R. Co.*, 344 U.S. 293, 297 (1953); *In re Spring Valley Farms*, 863 F.2d 832, 834 (11th Cir. 1989) (collecting cases).

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Although not a party nor a creditor, CNA had actual notice of the proposed reorganization plan agreed to by the debtor and creditor committees. That plan proposed the transfer of stock from the debtor to a trust which was to resolve all pending asbestos claims (App. 82a). The only reference to the insurance dispute was that, as a condition precedent to the confirmation of the plan, UNR reserved the right to litigate with and retain

any recovery from the insurers (App. 86-87a, 90-91a). A reorganization plan may provide for the retention and enforcement of any claim or interest. 28 U.S.C. §1123(a)(5) and (b)(3)(B).

The Seventh Circuit held that CNA had notice and an opportunity to participate in the bankruptcy proceedings (App. 6a). It concluded that the valuation of the tort claims was reasonable (App. 6a).[9] It held that the estimation of the value as found by the bankruptcy court in confirming the proposed plan was final, appealable and binding, and that the "parties may not re-litigate the matter" (App. 5a).

The circumstances in this case establish that since the reorganized corporation had reserved the right to litigate the insurance dispute, CNA had no reason to object to the proposed reorganization plan. The insurance dispute had been withdrawn to the district court, and CNA was not on notice that confirmation of the plan (in which the value of the tort claims was estimated) would be ultimately found to be conclusive on CNA. Under the Code, a bankruptcy court lacks jurisdiction to liquidate or estimate tort claims for distribution, and it cannot adjudicate such claims. 28 U.S.C. §157(b)(2)(B), (b)(2)(0), and (b)(5). Here, the district court repeatedly ruled that although the bankruptcy court could estimate the value of tort claims for purposes of reorganization, it could not adjudicate them under 28 U.S.C. §157. *In re UNR Indus., Inc.*, 45 B.R. 322, 325-27 (N.D. Ill. 1984); *In re UNR Indus. Inc.*, 74 B.R. 146, 148-49 (N.D. Ill. 1987).

Notwithstanding UNR's retention of the insurance cause of action, the Seventh Circuit held that the insurer was bound to the estimation of value of the tort claims made by the bankruptcy court in its confirmation order. The Fifth Circuit has also addressed this issue. In *In re Howe*, 913 F.2d 1138 (5th Cir. 1990), it held that even though the debtor generally reserved the right to litigate all other causes of action, this did not preclude the application of res judicata since the facts and circumstances were

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[9] The Seventh Circuit did not have a complete record of the bankruptcy proceedings before it and could not have been aware of the hearings on the proposed plan. The confirmation order was appealed to a different district court. *Unarco Bloomington Factory Workers v. UNR Indus., Inc.*, 124 B.R. 268 (N.D. Ill. 1990). The Seventh Circuit did have the proposed plan and the confirmation order in its record.

fully litigated in the prior bankruptcy when a proof of claim was contested. However, the Fifth Circuit acknowledged that its result could be different if the party had not been a major creditor in the bankruptcy court and the claim not specifically dealt with in the plan. 913 F.2d at 1147 n. 30. *In re Auto West, Inc.*, 43 B.R. 761, 764 (D.Utah 1984) holds that where the right to litigate an action is reserved in a reorganization plan "application of res judicata, estoppel or waiver" is improper. *C.f. Coral Gables First Nat'l Bank v. Constructors of Florida, Inc.*, 299 F.2d 736 (5th Cir. 1962) (where plan of reorganization provided that litigation with the debtor would continue in state court, the state court had jurisdiction to issue final judgments, not the bankruptcy court).

The Seventh Circuit's decision raises the constitutional question whether the notice given under these circumstances was adequate under the due process clause. Despite CNA's actual knowledge of the proposed reorganization plan, was CNA reasonably apprised that it would eventually be conclusively bound by the bankruptcy court's estimation of the value of all present and future tort claims in confirming a consensual plan?

III. WHETHER PRECLUSION PRINCIPLES APPLY TO AN ORDER CONFIRMING A REORGANIZATION PLAN IN WHICH THE PARTIES ESTIMATED THE VALUE OF TORT CLAIMS BY AGREEMENT?

While collateral estoppel precludes relitigation of an issue actually decided in prior litigation, it does not apply when the prior litigation was resolved by agreement of the parties. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 327 n. 12 (1955); *United States v. Int'l Bldg Co.*, 345 U.S. 502, 506 (1953). *See also La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900, 906-07 (7th Cir. 1990) (collecting cases). This is equally true in a class action, where there is a right to object. If the case is resolved by agreement, the court's approval is a consent decree, not binding on non-parties. *Local No. 93, Int'l Ass'n of Fire-fighters v. Cleveland*, 478 U.S. 501, 522, 528-29 (1986). *Accord Martin v. Wilks*, 490 U.S. 755, *reh'g denied*, 492 U.S. 932 (1989). To hold otherwise would contravene "the general rule that a person cannot be deprived of his legal rights in a proceeding

to which he is not a party." *Martin*, 490 U.S. at 759.

Settlements and compromises may be made in a plan of reorganization. *C.f. Protective Committee for Indep., Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424, *reh'g denied*, 391 U.S. 909 (1968). Here, the formula by which the value of the tort claims was estimated was agreed upon by the debtor and the creditor committees (App. 85a). That estimated value was contained in the plan which was confirmed by the bankruptcy court.

There is a split in the circuits as to whether orders confirming reorganization plans are consent decrees where agreed to by creditors. The Fifth and Tenth Circuits have held that confirmation orders under such circumstances are consent decrees, to be construed under contract rules. *Paul v. Monts*, 906 F.2d 1468 (10th Cir. 1990); *In re Stratford of Texas, Inc.*, 635 F.2d 365 (5th Cir. 1981) (plan adopted by majority of creditors). The Ninth Circuit has held that a reorganization plan accepted by 89% of the creditors was not a private contract through which the obligations of persons not party to the bankruptcy proceedings could be released. *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985).

Here, the Seventh Circuit held that it "did not matter" whether the bankruptcy order was a judgment or settlement (App. 4a). Under CNA's policy, however, the difference is crucial since, if it were a settlement which resulted in a consent decree, then CNA is only bound if it agreed and was a signatory to the settlement agreement (*supra*, p. 4 n. 3). CNA's written consent to settlement by the insured is a condition precedent to any action by the insured based on the policy (Doc. 2050 (UNR SJ Mot.) Exh. 1 p. 5 ¶7).

The second issue which arises in this regard is whether there was a finding of fact actually and necessarily determined by the bankruptcy court, a prerequisite to preclusion principles. *Brown v. Felsen*, 442 U.S. 127, 139 n. 10 (1979). Here, the bankruptcy court confirmed the plan of reorganization, in which the value of the tort claims was estimated by using a formula negotiated and agreed upon by the debtor and creditor committees, parties in the bankruptcy proceeding (App. 83-85a). The

Seventh Circuit held that CNA was bound to that estimated value, but it adjusted it upwards to a "real value" by using the negotiated formula (App. 6a).

The question then arises whether there was any "fact" found in the confirmation order where the value was only estimated by agreement? Under the Bankruptcy Code, tort claims must be estimated in order to determine whether reorganization is feasible. *A.H. Robins*, 788 F.2d at 1012. The bankruptcy court lacks the authority to liquidate such claims; only a district court can adjudicate the tort claims. *Id.; UNR*, 45 B.R. at 326; 28 U.S.C. §157(b)(2)(B), (b)(2)(O), and (b)(5). However, the value of such claims may be estimated, and reorganization confirmed, before the tort claims are liquidated in the district court. *A.H. Robins*, 788 F.2d at 1012; *In re White Motor Credit*, 761 F.2d 270, 274 (6th Cir. 1985); *UNR*, 45 B.R. at 326.

This Court should accept this petition to determine whether preclusion principles apply where the former adjudication was resolved by consent of the parties. One issue is whether a confirmation order accepted by creditors is a consent decree, not binding on non-parties? The second is whether a non-party is bound by a finding of "fact" where that "fact" was the estimation of the value of tort claims, reached by a negotiated, agreed upon formula.

IV. WHETHER THERE IS A CASE OR CONTROVERSY WHERE NO COVERED CLAIM HAS BEEN IDENTIFIED AS REQUIRED BY STATE LAW?

A federal court is constitutionally constrained by Article III to resolve cases and controversies, which must be present at all stages of the litigation. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990). Before a federal court may adjudicate a declaratory judgment action, there must be "concrete legal issues, presented in actual cases, not abstractions." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). The test is whether, under all the circumstances, "there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Id.*

The district court here held that there was no present controversy for it to resolve. Illinois law requires a case-by- case showing of whether a claimant's claim falls within CNA's policy period. *Zurich*, 118 Ill.2d at 47-48, 545 N.E.2d at 161. Here, no such showing has been made by UNR.[10] Because the district court found no present liability, it never addressed the question of how the claims should be valued.

On appeal, valuation of the tort claims was not an issue nor briefed. The Seventh Circuit affirmed the district court's interpretation of *Zurich* in its entirety (App. 9a n. 2) and elsewhere held that the holding that Illinois law required identification of claims on a case-by-case basis "may be right" (App. 10a). It then discussed how the claims should be valued and, by applying the formula negotiated by others, increased the estimated value of all tort claims, to find the "real value." This holding is akin to bifurcating trial and having the jury consider damages before liability.

If the reorganization plan is not binding on CNA, there still has been no binding judgment or settlement and this claim for indemnification is premature. Until any claim is tendered to CNA, and refused, there is no further controversy for a court to resolve. The Seventh Circuit held that it is "common" in insurance disputes to seek a declaration of the obligation to indemnify, citing *ACandS, Inc. v. Aetna Casualty & Sur. Co.*, 666 F.2d 819, 822-23 (3d Cir. 1981) (App.3a n.1). On the contrary, the question of whether an insurer must indemnify before there has been a judgment or settlement is one on which the circuits are divided.[11]

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[10] It has been CNA's position for the last decade that if UNR tendered a covered claim which fell within CNA's policy period after exhaustion of the primary limits, CNA would indemnify UNR. In 1980, a UNR memo recorded CNA's willingness to "step in when Continental's primary insurance was exhausted" (Doc. 2048 (CNA Stmt) p.2). CNA has repeated its position throughout this litigation (*see, e.g.*, Doc. 1891 (CNA Resp.) p.3; Sup.Rec.Vol. 23 #81 p. 1 and #82 p. 8; Doc. 1889 (CNA Reply) p. 11; Doc. 2058 (CNA Reply) pp. 13-14).

[11] The duty to indemnify and duty to defend are distinct obligations. It is common to seek a declaration of an insurer's obligation to defend, not to indemnify, before judgment or settlment. *U.S.F.&G. v. Wilkin Insulation Co.*, 144 Ill.2d 64, 73, 578 N.E.2d 926, 930 (1991); *Zurich*, 118 Ill.2d at 52, 514 N.E.2d at 163.

The Second, Fourth, Fifth, Eighth and Eleventh Circuits have held that there is no case or controversy until there has been an adjudication of the insured's liability. *Greenwich Marine, Inc. v. S.S. Alexandra*, 339 F.2d 901 (2d Cir. 1965); *A/S J. Ludwig Mowinckles Rederi v. Tidewater Constr. Corp.*, 559 F.2d 928 (4th Cir. 1977) (recognizing conflict between the Second and Third Circuits); *American Fidelity & Casualty Co. v. Pennsylvania Threshermen & Farmers' Mut. Casualty Ins. Co.*, 280 F.2d 453, 461 (5th Cir. 1960); *Century Indemnity Co. v. McGillacuty's, Inc.*, 820 F.2d 269 (8th Cir. 1987); *Armstrong v. Alabama Power Co.*, 667 F.2d 1385 (11th Cir. 1982). "It is not the function of a United States District Court to sit in judgment on . . . nice and intriguing questions which today may readily be imagined, but may never in fact come to pass." *American Fidelity*, 280 F.2d at 461. *See also UNR Indus., Inc. v. American Mut. Liability Ins. Co.*, 92 B.R. 319 (N.D.Ill. 1988); *Forty-Eight Insulations, Inc. v. Johns-Manville Prod. Corp.*, 472 F.Supp. 385 (N.D.Ill 1979). The Seventh Circuit has also held that such an action is premature. *Cunningham Bros., Inc. v. Bail*, 407 F.2d 1165 (7th Cir.), *cert. denied*, 395 U.S. 959 (1969).

The Third Circuit, like the Seventh Circuit in this case, has held that it may resolve whether an insurer owes a duty to indemnify even though there has been no settlement or judgment entered against the insured. *ACandS, Inc. v. Aetna Casualty & Sur. Co.*, 666 F.2d 819, 822-23 (3d Cir. 1981). *C.f. Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.*, 339 F.2d 673, 674-75 (3d Cir. 1964), *cert. denied*, 382 U.S. 812 (1965).

Century Indemnity, like this case, involves an excess policy. The Eighth Circuit held that a cause of action against an excess insurer is premature and presents no case or controversy until it is established that the liability faced by the insured would reach beyond the primary limits into the excess limits, in conflict with the Seventh Circuit's opinion here. *Century Indemnity*, 820 F.2d at 270.

The Seventh Circuit recognized that before CNA's insuring obligations were triggered, an allocation of claims had to be made to determine whether there were claims which fell within CNA's policy period (App. 11a). It also recognized that the district court would have to determine whether the value of those claims

exceeded the underlying insurance. Finally, it acknowledged that CNA as excess insurer was only liable for the amount which exceeded the primary insurance subject to the yearly policy limits of the CNA policy.

The Seventh Circuit then did an extended analysis of the value of those possible claims. It ignored the fact that unless and until even a single claim is identified as falling within CNA's policy period, there is no need to value them. CNA moved for summary judgment on the basis that *not a single person alleged to have been injured by UNR asbestos had ever been identified by UNR as a person whose claim was covered by CNA's policy.* At this juncture, until UNR identifies such a claim, there is no controversy over the value of any claim. "[R]ipeness is peculiarly a question of timing. [I]ts basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas*, 473 U.S. at 580 (citations omitted). If a claim is premised on "contingent future events that may not occur as anticipated," it is premature. *Id.* at 580-81.

The district court correctly concluded that there was no present basis for further declaratory relief. There can be no case or controversy against CNA until UNR tenders claims for indemnification which are covered claims under the policy and which are refused. *Compare Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, *reh'g denied*, 300 U.S. 687 (1937). It is not surprising that UNR to date has failed to proffer even a single name. CNA did not insure UNR when it was making asbestos products, thus there was no "exposure" during its policy period which would trigger its insuring obligation under *Zurich*. UNR has never shown that the second trigger (that the claimant manifested sickness or disease during CNA's policy period) was met either. CNA insured UNR before most asbestos victims became ill — only about 100 suits were filed during CNA's policy period and in the two years thereafter, when most statutes of limitations would run. These claims no doubt were settled long before the bankruptcy, and either before or during the Houston Agreements. The Seventh Circuit's analysis of the "real value" of claims is premature since, until a claim is identified, there is no need to value it.

This Court should accept this case for review to resolve the conflict in the circuit courts and determine whether there is a present controversy to be resolved.

CONCLUSION

Petitioner Continental Casualty Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above entitled proceedings on August 29, 1991, and the denial of the petition for rehearing on October 3, 1991.

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91-1308

No. _____

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States October Term, 1991

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (ALABAMA), UNR-ROHN, INC. (INDIANA), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., LEAVITT STRUCTURAL TUBING CO., and FOLDING CARRIER CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

APPENDIX

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In the
United States Court of Appeals
For the Seventh Circuit

No. 90-2188

UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., LEAVITT STRUCTURAL TUBING CO., and FOLDING CARRIER CO.,

Plaintiffs-Appellants,

v.

CONTINENTAL CASUALTY COMPANY, NATIONAL SURETY CORPORATION, and FIREMAN'S FUND INSURANCE CO.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 3532—**William T. Hart,** *Judge.*

ARGUED MAY 7, 1991—DECIDED AUGUST 29, 1991

Before WOOD, JR. and MANION, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

ESCHBACH, *Senior Circuit Judge.* UNR Industries, Inc. and related corporations (together, "UNR") manufactured asbestos until 1970. In other proceedings, more than 100,000 people claim that they now suffer disease because of their exposure to this asbestos. UNR's insurance carriers are responsible for at least a portion of these claims, and

UNR brought the present suit to enforce what it alleges are the insurers' respective obligations. The District Court, Judge Hart presiding, ably resolved a great many questions and the parties settled others, with nine of the insurance carriers together paying more than $70 million to UNR as a result.

Here UNR appeals the dismissal of its claims against two insurers, Continental Casualty Company ("CNA") and National Surety Corporation and its parent corporation (together, "National Surety"). We reverse and remand as to CNA because the District Court's dismissal failed to take adequate account of UNR's bankruptcy reorganization. We affirm as to National Surety because UNR was late in raising and pressing the claim at issue, and the District Court was within its discretion to bar the claim as a sanction.

Jurisdiction and Choice of Law

The District Court had subject matter jurisdiction under 28 U.S.C § 1334(b), which provides that "the district courts shall have original . . . jurisdiction of all civil proceedings . . . related to cases under title 11" of the Bankruptcy Code. In general, a "dispute is 'related to' the bankruptcy . . . [if] it affects the amount of property available for distribution or the allocation of property among creditors." *In re Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987). The present case is "related to" UNR's previous bankruptcy proceeding under title 11 because this case concerns UNR's interest, if any, in insurance policies that CNA and National Surety issued. The scope of UNR's interest "affects the amount of property available for distribution," establishing the District Court's jurisdiction. We have jurisdiction to hear the appeal of the District Court's final order under 28 U.S.C. § 1291.

State law controls the determination of assets in a bankrupt estate, unless federal interests require a different result. *Butner v. United States*, 440 U.S. 48, 54 (1979); *see In re Streets & Beard Farm Partnership*, 882 F.2d 233,

235 (7th Cir. 1989). No such federal interests are present in the current case, so state law applies. UNR and the other parties have relied on Illinois law. We follow their lead because "litigants are, within limits not exceeded here, permitted to designate what law shall control their case." *Northwestern National Insurance v. Donovan*, 916 F.2d 372, 374 (7th Cir. 1990).[1]

UNR's Claim Against CNA

The District Court dismissed UNR's claim for a declaration of CNA's insurance obligations, concluding that the asbestos victims had not yet obtained a judgment or settlement from UNR that would trigger those obligations. The District Court further concluded that, in the future, UNR will be able to enforce CNA's obligations only by proving the amount that specific asbestos victims actually receive on their claims. Memorandum Opinion and Order, April 30, 1990, pp. 6, 8-9. We reverse and remand for further proceedings because the District Court's judgment fails to take adequate account of the effects of UNR's bankruptcy, may confer a windfall on CNA at the expense of the asbestos victims, and improperly prejudges the form of proof that UNR must use.

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[1] A further point is that the basis of the current claims is UNR's First Amended Adversary Complaint, filed in 1984, in which UNR seeks a declaratory judgment under 28 U.S.C. § 2201, and other relief not at issue here. This request for a declaration is common practice in insurance disputes, and does not impair jurisdiction. *See ACandS, Inc. v. Aetna Casualty and Surety Company*, 666 F.2d 819, 822-23 (3rd Cir. 1981). Such a declaration is often essential to settlement with the injured party, *id.*, at 823, and in many cases to determining the insurer's duty to defend an underlying suit. In the seven years since UNR filed its amended complaint, however, so many other issues have been resolved that the declaratory posture of UNR's claim has probably stopped serving any purpose. On remand, the District Court may consider allowing—or requiring—UNR to amend its pleadings to make the remaining portion of the case a straight action for damages.

CNA is an excess insurer. That is, it provided UNR with an additional layer of insurance on top of UNR's other, primary insurance policies. The amount of this insurance was $5 million per year for a three year policy period, November 1, 1970 to November 1, 1973. The policy provides in its first sentence that CNA "will indemnify the insured for *loss* in excess of the total applicable limits of underlying insurance." CNA Umbrella Excess Third Party Liability Policy No. RDU8062037 (the "CNA Policy"), "Coverage", ¶ 1 (emphasis added). The CNA Policy then defines "loss" as "the sums paid as damages in settlement of a claim or in satisfaction of a judgment." *Id.*, "Definitions." Tracking this definition, the "no action" clause of the CNA Policy further provides, "No action shall lie against [CNA] unless . . . the amount of [UNR's] obligation to pay shall have been finally determined either by judgment against [UNR] or by written agreement of [UNR], the claimant, and [CNA]." *Id.*, "Conditions," ¶ 7. The threshold question is whether UNR has suffered any "loss" under these provisions. It has. UNR's bankruptcy resulted in a judgment or settlement (which one does not matter) against UNR in the amount of $254 million on the asbestos claims.

A brief discussion of the procedure of this case should make this conclusion clear. In 1982, UNR petitioned for bankruptcy reorganization. At the time, the company was faced with about 12,000 asbestos claims—the number has since grown to more than 105,000—and was spending more than a $1 million dollars a month in legal expenses. In an innovative plan, the bankruptcy court approved a reorganization under which UNR transferred about 63% of its stock to a trust (the "Trust"). The Trust operates independently of UNR and for the exclusive benefit of the asbestos victims. In essence, then, the asbestos victims are now UNR's majority owners. The asbestos victims agreed, and the bankruptcy court confirmed, that their claims would "be fully settled and satisfied" by the distribution of UNR's stock to the Trust. Consolidated Plan of Reorganization, March 14, 1989, Article III, *confirmed by* Confirmation Order, June 1, 1989.

This bankruptcy reorganization was a judgment or settlement and so triggers CNA's insurance obligations. The reorganization required UNR to pay a sum certain (the stock, which had a market value of $150 million) in satisfaction of the asbestos claims. The order confirming that reorganization was final and appealable. And the order is binding. The parties may not re-litigate the matter. Under any definition of judgment or settlement, this qualifies. Having suffered an adverse judgment or settlement, UNR has suffered a "loss" within the meaning of the CNA Policy.

A further issue is the amount of UNR's loss. CNA's excess insurance was in effect only from November 1, 1970 to November 1, 1973, so the relevant loss is only amounts attributable to that period. CNA argues that the amount of this loss depends on how much money the Trust actually pays to asbestos victims with valid claims for the period in question, and the District Court agreed on this point. *See* Memorandum Opinion and Order, April 30, 1990, pp. 6, 8-9. But this approach threatens to confer a windfall on CNA at the asbestos victims' expense.

The reason for the potential windfall is that UNR paid the Trust only a portion of the asbestos victims' actual damages in the bankruptcy proceedings. This discounting of the asbestos victims' damages had nothing to do with the merits of their claims. The discounting merely reflected the amount of UNR's assets that the asbestos victims could reach. CNA may profit greatly from UNR's bankruptcy if its obligations are based on the arbitrarily discounted amount that the asbestos victims actually receive from the Trust. This profit for CNA would be contrary to both the CNA Policy and Illinois law. CNA Insurance Policy, "Conditions," ¶ 7 (stating, "Bankruptcy . . . of the insured . . . shall not relieve [CNA] of any of its obligations"); Ill. Rev. Stat., ch. 73, § 1000 (requiring that liability insurance policies contain such a provision); *see also Harbor Insurance v. Continental Bank*, 922 F.2d 357, 368 (7th Cir. 1990) (applying Illinois law and concluding that "[t]he point of [liability] insurance policies . . . [is] to eliminate the very

solvency risk" that would lead to a settlement limited by the amount of the insured's assets).

No guesswork is necessary to determine the amount of this discounting. In UNR's bankruptcy disclosure statement, it reported that its unsecured creditors, excluding the asbestos victims, had $112 million in claims against the company. It further reported that negotiations between the various parties, including the representatives of the asbestos victims appointed by the bankruptcy court, resulted in a valuation of the asbestos claims in an amount "2.27 times greater" than the other unsecured claims, UNR Disclosure Statement, March 14, 1989, p. 11, which yields $254 million as the real value of the asbestos claims. This valuation of the asbestos claims was essential to the division of UNR's stock in the bankruptcy proceedings. Without it, no basis would have existed for dividing UNR's assets one way instead of another.

This valuation is binding on CNA despite the "no action" clause of its policy. Again, that clause provides, "No action shall lie against [CNA] unless . . . the amount of [UNR's] obligation to pay shall have been finally determined either by judgment against [UNR] or by written agreement of [UNR], the claimant, and [CNA]." *See* CNA Policy, "Conditions," ¶ 7. Assuming for the moment that the reorganization order was not a "judgment" but only a "written agreement", the "no action" clause would on its face bar suit because CNA was not a party to the agreement. But without dispute, CNA had notice of the bankruptcy reorganization and opportunity to participate. Also without dispute, the valuation of asbestos claims in the reorganization was reasonable. These points would certainly establish a waiver of any "no action" rights if CNA were a primary insurer, with a duty to defend its insured against claims. *See, e.g, Maneikis v. St. Paul Insurance*, 655 F.2d 818, 827 (7th Cir. 1981) (applying Illinois law).

Under its policy, CNA had the option not to defend. Instead, it could make UNR defend itself after the exhaustion of UNR's primary coverage and later indemnify UNR for the costs that it incurred. *See* CNA Policy,

"Defense Coverage Endorsement", ¶ 1. We have not found any Illinois cases dealing with an excess insurer's obligations to participate in settlement so as to avoid waiver of its "no action" rights. On the facts of the present case, however, we are confident that an Illinois court would hold CNA's "no action" clause waived. As Illinois courts recognize, "[t]he purpose of the 'no action' clause is to protect the insurer from collusive or overly generous or unnecessary settlements by the insured at the expense of the insurance carrier." *Mayfair Construction Co. v. Security Insurance*, 51 Ill.App.3d 588, 366 N.E.2d 1020, 1024 (1977), *quoting DeLuxe Motor Stages v. Hartford Accident & Indemnity*, 88 Ill.App.2d 188, 193, 232 N.E.2d 141, 144 (1967). This case presents no such danger because the reorganization could not have taken place with the consent of just UNR and the asbestos victims. UNR's other creditors also had to approve, and they had strong reason to fight for as low a valuation of the asbestos claims as possible. The lower the valuation, the greater the portion of UNR's assets these other creditors could reach. This antagonism of interests removes any significant danger that the $254 million valuation of the asbestos victims' claims might contain any artificial inflation at CNA's expense. In short, CNA is bound by the $254 million valuation of the asbestos victims' claims in the reorganization.

For lack of firm facts, we will not attempt to refine this $254 million figure further. We note, however, that this $254 million reflects the value of the asbestos claims as "reduced . . . to present value." UNR Disclosure Statement Pursuant to § 1125 of the Bankruptcy Code, March 14, 1989, p. 11. This present value as of 1989 should be adjusted upwards by an appropriate interest rate to reflect the passage of time, because the issue is CNA's *current* obligation to pay on its insurance policies.

Further, the $254 million figure does not include the cost of asbestos claims settled by UNR and its other insurance carriers prior to the reorganization. CNA states in the record that these settlement costs were $8.4 million,

see Affidavit of Stephen R. Hoff, Table 9, but we do not decide the actual value. The point is only that the full value of all asbestos claims includes pre-reorganization claims as well. The parties may come up with other, valid adjustments to the $254 million value of the asbestos claims determined by the reorganization. On remand, the District Court should consider such additional adjustments to the extent necessary to determine CNA's obligations.

The key question is how much of the $254 million (as adjusted) is allocable to each year that CNA provided its excess insurance. The parties agree that the Illinois Supreme Court's decision in *Zurich Insurance v. Raymark Industries*, 118 Ill.2d 23, 514 N.E.2d 150 (1987) controls this allocation. In *Raymark*, the Court interpreted the policy terms "sickness," "disease" and "bodily injury" in the context of insurance coverage in asbestos cases. The Court concluded that a " '[b]odily injury' takes place at or shortly after the time a claimant is exposed to asbestos and continues throughout a claimant's exposure to asbestos." 514 N.E.2d at 161. "Disease" is an illness that is "reasonably capable of clinical detection and diagnosis." *Id.* And " 'Sickness' takes place at any time during which the claimant 'suffers from a disordered, weakened, or unsound condition' before the clinical manifestation of a disease.' " *Id.*

Not surprisingly, UNR and CNA disagree about what portion of the asbestos claims meet the *Raymark* standards for the policy period. UNR urges 69%; CNA argues that the number is about 3.8%. *See* UNR's Reply Memorandum in Support of its Motion for Partial Summary Judgment, June 6, 1989, p. 13 (naming 69% figure); CNA's Affidavit of Steven R. Hoff, Tables 5 and 6 (reporting 587 claims out of 15,339 reviewed by CNA as showing evidence of exposure or manifestation during the policy period).[2]

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[2] We note that both sides appear to be fudging on their numbers. UNR's 69% figure includes claims in which the victim was exposed

(Footnote continued on following page)

To resolve this disagreement, the District Court stated that UNR must prove the amount of the claims falling within the CNA policy period on a case-by-case basis. *See* Memorandum Opinion and Order, pp. 6, 8-9. UNR counters, with the help of amici representing the present and

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[2] *continued*

to asbestos prior to CNA's policy period and manifested sickness or disease after that policy period. *See* UNR's Reply Memorandum in Support of its Motion for Partial Summary Judgment, June 6, 1989, pp. 13-4 n. 12. Such victims were subject to "exposure-in-residence" during the policy period, that is, had asbestos fibers in their lungs and possibly causing damage during that time. Under *Raymark*, however, exposure-in-residence does not count as a trigger for insurance liability. *See Raymark*, 514 N.E.2d at 160-161. (UNR briefly argues the issue, but we affirm the District Court's interpretation of *Raymark* in all respects).

CNA also appears overly optimistic in its presentation of the numbers. CNA reviewed 15,339 of the claims against UNR and concedes that 587 of these claims, 3.8%, assert exposure or manifestation within the *Raymark* criteria. But CNA generally counted claims as within *Raymark*'s definitions only "if the file contained documents *in addition* to a complaint which contained information about exposure to UNR asbestos or manifestation of sickness or illness." Affidavit of Steven R. Hoff, October 25, 1989, ¶ 4 (emphasis added). Thus, CNA is not counting claims in which only the complaint alleges exposure or manifestation during the policy period. In fact, by CNA's own count, the majority of claims do not even include a complaint, *id.*, at Table 4, as would be expected given the stay of all litigation that accompanied UNR's bankruptcy petition.

It is no surprise, then, that not many claims contain the additional proof for which CNA was looking. Along these lines, CNA admits that 10.2% (339 out of 3,325) of the closed, prebankruptcy claims contain evidence that would place them within CNA's coverage. *Id.*, at Tables 6 and 7. These cases should have the most complete documentation and so might give the best idea about the nature of the claims as a whole. If so, CNA loses this case on remand. At an unadjusted value of $254 million for the asbestos claims, CNA's $15 million in coverage would almost certainly be exhausted if 10% of the claims (that is, about $25 million worth) fall within CNA's policy period. We say "almost certainly" because, as discussed in the text, it is still possible that some claims would have already been paid by other insurance.

future asbestos victims, that one of the basic goals of the Trust is to maintain low administrative costs by keeping case-by-case analysis of claims to a minimum. UNR contends that it can use random sampling and/or other statistical analyses to show the percentage of the claims that lie within CNA's policy period.

In other words, what kind of proof must UNR present? We do not mean to be glib in responding that the answer lies in the whole of the Federal Rules of Evidence. The point of the Rules is to identify the forms of proof that will "secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of . . . the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102. Statistical evidence may or may not be admissible under these Rules, depending for example on the qualifications of the person who presents it, see Rule 702, and whether the basis for the evidence is of a type reasonably relied on by experts in the field, see Rule 703 & Advisory Committee Note.

The District Court may be right that only a case-by-case analysis of the asbestos claims will yield sufficient evidence to show how many of the claims against UNR fall within the CNA policy period under the *Raymark* definitions. The matter should not be prejudged, however. UNR has the right to present whatever types of proof it thinks appropriate, whether on a renewed motion for summary judgment or in a trial on the merits, and have that proof evaluated for admissibility and persuasiveness when presented. The risk that UNR, like any other litigant, runs is that statistics may be less persuasive than evidence of each individual case. In other words, by relying solely on statistical data, a party risks losing a case that it could have won by going to the expense of more specific proof. But that risk is UNR's to take if it finds appropriate.

As an excess insurer, CNA is not responsible for the full amount of the $254 million (again, as adjusted) allocable to each year of its policy period. UNR and CNA

agree that CNA's excess insurance policy "required UNR to maintain underlying primary insurance with minimum limits of $500,000. If UNR failed to do so, then CNA would only be liable to the same extent as if the primary insurance had been maintained." Brief and Argument of Defendant-Appellee CNA, p. 24; *see* UNR's Opening Brief, p. 10; CNA Policy, "Conditions", ¶ 2. On remand, then, the District Court can ignore issues such as whether UNR's underlying insurer actually paid the full amount of its coverage pursuant to its settlement with UNR. Whether or not the underlying insurer performed the obligations *within* its coverage, CNA remains liable for claims *beyond* that underlying coverage. Thus, once the District Court determines how much of the $254 million value of all of the asbestos claims is allocable to each year of CNA's policy period under *Raymark*, CNA is responsible for any amount of this allocation that exceeds $500,000 in any year, subject to its policy limit of $5 million per year.

One further qualification applies. It is possible that some claims for which CNA might be liable have been paid by insurers for other years. For example, a person might have been exposed to asbestos in 1962, become sick in 1972, and been clinically diagnosed as diseased in 1975—with insurers for each of these three years being liable for the claim under *Raymark*. If CNA could prove that other insurance has fully covered the asbestos claims for certain years, then it would not be obliged to give UNR a double recovery simply because claims for the fully covered years also happened to lie within the CNA policy period. The burden of proof on this issue lies with CNA because under Illinois law, "[o]nce the insured has brought himself within the terms of his policy, then the insurer must prove the applicability of an exception in the coverage if it wishes to escape liability." *St. Michael's Orthodox Catholic Church v. Preferred Risk Mutual Insurance*, 146 Ill.App.3d 107, 496 N.E.2d 1176, 1178 (1986).

To recap, the bankruptcy proceedings resulted in a judgment or settlement against UNR in the amount of $254

million on the asbestos claims. This $254 million may be subject to some adjustments, but it provides the firm starting point for analysis. CNA's excess insurance coverage was in effect only from November 1, 1970 to November 1, 1973, so the District Court will need to determine how much of the $254 million (as adjusted) is allocable to each year in that period, under the principles stated by the Illinois Supreme Court in *Raymark*. UNR can try to prove the allocable portion with whatever kinds of proof it chooses to offer, subject to the requirements of the Federal Rules of Evidence. CNA is then responsible for any amounts allocated to its policy period, less the $500,000 in underlying insurance that UNR was required to carry and less the amount of any claims that CNA can prove have already been paid by other insurance carriers, up to its $5 million per year policy limit.

These points are clear enough, except for a seeming sticking point that merits a brief aside. Any money that CNA must pay on its insurance policies will go to UNR, not to the asbestos victims directly or even to the asbestos victims' Trust. In part, this distinction is form not substance. Again, the Trust owns 63% of UNR, so any payment to UNR is mostly for the asbestos victims' benefit. But that still leaves 37% of any payment going to UNR's other stockholders. If UNR receives the policy limit of $15 million from CNA and pays this money to its stockholders in dividends, then the 37% owners would receive $5.55 million of the insurance money. These 37% owners, however, never suffered any asbestos injury. Why should CNA pay anything to them?

The answer is that the 37% owners *have* given up something. In the bankruptcy proceedings, the asbestos victims could have received the right to sue CNA directly on the insurance claims. The quid for this quo would have been that the asbestos victims would have received less stock in post-bankruptcy UNR, and the 37% owners would have received more. This arrangement would have caused problems, however, because one of the basic points of the bankruptcy reorganization was to ensure that the asbestos

victims would receive majority control of UNR. If the asbestos victims' Trust received less stock, it might not have had majority control, or might have been so close to the line that it would have lost its majority control if the need arose to sell off any shares to raise cash on an emergency basis. In short, the 37% owners have earned their portion of any money that may be due from CNA by foregoing the opportunity to receive more stock in the bankruptcy proceedings.

Did the 37% owners of UNR really give up enough shares that they should now be entitled to as much as $5.55 million from CNA? This question might be answerable if we could reconstruct the bankruptcy negotiations and apply hindsight to see who came out the winner. That is not the purpose of this appeal, however. The only point we need to rely on is that the bankruptcy court approved the reorganization plan as fair, and CNA has not contested this finding.

Three examples may offer another perspective on why CNA should pay money to the 37% owners. In the first example, suppose that Manufacturer has an insurance policy with Insurer. Victims suffer injuries within the scope of the policy, but Insurer refuses to defend. Victims and Manufacturer settle in good faith for $10 million. Manufacturer can then sue Insurer for indemnity, but its claim is limited to the $10 million it actually paid to Victims for injuries within the scope of the policy. *See Hartford Accident and Indemnity v. Gulf Insurance*, 776 F.2d 1380, 1382 (7th Cir. 1985) (discussing Illinois law). Victims have no further cause of action because they have been fully compensated.

The second example has the same facts, but Victims suffer a greater injury. Manufacturer is unable to pay the full amount of damages. Instead, Manufacturer gives Victims $10 million as a partial monetary settlement. Manufacturer should also assign to Victims its right to sue Insurer for the rest of the damage, subject to the policy limit, an assignment that is valid regardless of what the

insurance policy may say. *See Maneikis v. St. Paul Insurance*, 655 F.2d 818, 826 (7th Cir. 1981) (stating that "policy provision[s] . . . can only prohibit assignment of policy coverage, not assignment of an accrued cause of action."). In this example, Insurer is liable to Victims for their uncompensated injuries, and should also indemnify Manufacturer for the $10 million it paid as partial reimbursement. For a case involving basically these facts, *see Maneikis*, 655 F.2d at 826-7 (applying Illinois law); *see also Harbor Insurance v. Continental Bank*, 922 F.2d 357, 368 (7th Cir. 1990) (offering the illustration, under Illinois law, that insurers should remain liable for the full $17.5 million of damages in that case even though the plaintiffs might have settled for only $5 million if they had to take account of the defendants' limited assets).

The third example is like the previous one. Only now, Manufacturer has a $10 million asset, call it the Hope Diamond, that cannot be divided without diminishing its value. The best arrangement would be for Manufacturer to give the Hope Diamond to Victims as partial settlement, but other creditors also have valid claims to the diamond. One solution would be for Manufacturer, Victims, and the other creditors to agree on a division—Victims receive the Hope Diamond and, say ⅔ of the insurance claim against Insurer, while the creditors receive ⅓ of the insurance claim in exchange for their interest in the diamond. This way, the value of the Hope Diamond is preserved and Victims receive the most value possible in compensation for their injuries. The fact that the creditors receive part of the insurance claim should not diminish the payment due from Insurer. Insurer is paying no more and no less than it did in Example 2.

Which of these examples best describes the present case? CNA urges that it is Example 1 because the insured, UNR, is the party making the insurance claim. In line with that example, CNA argues that its insured can only receive indemnification for actual dollars spent in settlement. The key difference, however, is that UNR's

bankruptcy settlement was only partial, limited by the assets that UNR had available.

Example 2 takes account of this partial settlement, but it envisions that Victims would receive the right to sue the Insurer directly. Example 3, not by accident, is our case. Like this example, the present case involves a partial settlement that includes transfer of an asset that (1) cannot be easily divided and (2) is subject to competing claims. Instead of the asset being "the Hope Diamond", the asset is "majority ownership of post-bankruptcy UNR." Like the Insurer in Example 3, CNA has nothing to complain about. Following a partial settlement, an insurer's obligation is to pay the full, uncompensated balance of a victim's injury, regardless of how the victim has assigned its cause of action.

This aside thus leaves unchanged our original conclusions. The bankruptcy reorganization included a judgment or settlement for $254 million that triggered CNA's insurance obligations. This $254 million may be subject to further adjustments, which UNR and CNA can present to the District Court. The District Court then must determine how much of this $254 million (as adjusted) is allocable to the CNA policy period under the principles stated in *Zurich Insurance v. Raymark Industries*, 118 Ill.2d 23, 514 N.E.2d 150 (1987). UNR may try to prove the proper allocable amount through any form of evidence that the Federal Rules allow. Subject to its policy limits, CNA is responsible for any allocated amounts above $500,000 per year that have not been paid by other insurers.

UNR's Claim Against National Surety

UNR claims that another insurer, National Surety, failed to honor the "contractual" liability portion of a primary comprehensive general liability policy for the years 1945-48. The District Court dismissed this claim, relying on a number of alternative reasons. The District Court held that UNR raised its contractual liability claim too late; that UNR's own evidence regarding other types of cover-

age contradicted any theory of contractual liability; and that laches and a special verdict by the jury regarding other coverage barred contractual liability. These alternative holdings present some close questions. We discuss only UNR's tardiness in raising its claim because it is sufficient to support the District Court's dismissal.

During the period at issue, National Surety offered various types of insurance coverage. Two of these were "products liability" coverage and "contractual liability" coverage. Under National Surety's standard form insurance contract, both contractual liability and products liability extended to "a warranty of goods or products." Standard Provisions for General Liability Policies, ¶¶ 2(a), 2(c) (February 1, 1943). This policy language makes both contractual and products liability coverage potentially applicable to the asbestos claims in this case.

The problem is that UNR focused on products liability during discovery and hundreds of pages of pretrial briefs, raising contractual liability for the first time in a proposed pretrial order. The District Court concluded:

> UNR has inexcusably delayed in raising the issue of contractual liability insurance. . . . UNR waited until March 20, 1986 to first mention this specific type of coverage—almost three years after the dispute began, more than one year after the close of discovery on the expedited issues, and four months after a discovery cutoff. UNR's assertion of its contractual liability theory for the first time in the final pretrial order simply came too late.

Memorandum Opinion and Order (November 8, 1988), p. 15. A trial judge is of course in the best position to evaluate the impact on the proceedings from the introduction of a new issue or theory in midstream. We review for abuse of discretion, *see, e.g., Bohen v. City of East Chicago*, 799 F.2d 1180, 1184 (7th Cir. 1986), and affirm.

Again, this case involved numerous issues and defendants. Eight years have passed since UNR and the insurance companies first filed their adversary claims in the

bankruptcy proceedings. If the District Court lacked the power to bar the parties from raising new theories, and new variations of theories, years into the litigation, then this case could have continued far longer. Justice delayed would have been justice denied for asbestos victims who would never have lived to see this case come to judgment because of the delay.

Beyond dispute, district courts have inherent authority to dismiss a claim for lack of prosecution. *See Chambers v. Nasco, Inc.*, ____ U.S. ____, 111 S.Ct. 2123, 2132 (1991); *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-631 (1962). UNR's Complaint contained broad language about "primary liability coverage" that was probably adequate pleading for purposes of a contractual liability claim. But as the District Court concluded, UNR did essentially nothing to pursue contractual liability for the next three years. Whether this be called raising the claim "too late," or raising it on time and leaving it lie "too long," the result is the same. The District Court was within its discretion to bar the claim.

Conclusion

For the reasons stated, the District Court's judgment dismissing UNR's claim for declaratory relief against CNA is REVERSED and REMANDED WITH INSTRUCTIONS. The District Court's judgment dismissing UNR's claims against National Surety is AFFIRMED. We emphasize that Circuit Rule 36 shall not apply on remand. Each side is to pay its own costs of appeal.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—8-29-91—500

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

October 3, 19 91

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

UNR Industries, Inc., Unarco Industries, Inc., UNR, Inc., UNR-Rohn, Inc. (Alabama), UNR-Rohn, Inc. (Indiana), Jobal Tube Co., Inc., UNR Products, Inc., Leavitt Structural Tubing Co., and Folding Carrier Co.,

Plaintiffs-Appellants,

No. 90-2188 v.

CONTINENTAL CASUALTY COMPANY, NATIONAL SURETY CORPORATION, and FIREMAN'S FUND INSURANCE CO.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 85 C 3532

William T. Hart, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant, Continental Casualty Company, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 85 C 3532

UNR INDUSTRIES, INC., *et al.*,

Plaintiffs,

—v.—

CONTINENTAL INSURANCE CO., *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

Continental Casualty Co. ("CNA"), the remaining defendant in this protracted litigation between UNR Industries, Inc., et al. ("UNR"), and its insurers over the nature and extent of insurance coverage for liability with respect to asbestos-related injuries, moved for summary judgment dismissing UNR's remaining contract, tort and declaratory claims as to it. UNR has filed a cross motion for summary judgment for $15 million, the full amount of CNA's excess coverage for the period November 1, 1970 to November 1, 1973.

After a nine-week jury trial, declaratory relief was granted with respect to issues between UNR and certain primary insurance carriers on February 25, 1988. *UNR Industries, Inc. v. Continental Ins. Co.*, 682 F. Supp. 1434 (N.D. Ill. 1988). Thereafter, declaratory judgment issues between UNR and all carriers, including CNA, were considered. On November 8, 1988, additional declaratory relief was granted (1988 U.S. Dist. LEXIS 12561), as amended on January 10, 1989. On June 13, 1989, an order was entered approving settlement agreements between UNR and all remaining defendants other than CNA.

I.

FACTS

UNR or its predecessors or subsidiaries manufactured insulation materials containing asbestos beginning as early as the 1940's. UNR sold its last plant that made asbestos in April of 1970, along with its remaining inventory. UNR began receiving bodily injury claims involving asbestos in 1966. Almost all claims assert exposure to asbestos prior to 1970.

UNR purchased an umbrella excess insurance policy from CNA for the period November 1, 1970 to November 1, 1973. During this same period, UNR had primary general liability insurance under a policy issued by Continental Insurance Company ("Continental"). The Continental policy limits were $500,000 for each year of insurance for bodily injury claims in addition to costs of defense. CNA's excess policy limits provided annual aggregates of $5 million for each of the three years of coverage. The excess policy allows CNA to defend claims or to indemnify UNR for judgments and the costs of defense. Payment for defense costs and indemnity payments apply against the annual aggregates.

CNA claims that Continental's limits have never been exhausted in any policy year by the payments of settlements or judgments. CNA states that neither UNR nor Continental have ever identified any specific claims of bodily injury brought against UNR as to which Continental has made payments to claimants or to UNR (thereby exhausting underlying coverage) and which are attributed to one of the CNA policy years.

As a result of the so-called "double trigger" for insurance coverage of asbestos-related claims defined by the Illinois Supreme Court in *Zurich Insurance Co. v. Raymark Industries, Inc.*, 118 Ill.2d 23, 415 N.E.2d 150 (Ill. 1987), CNA could be liable if it provided coverage during a claimant's period of exposure to asbestos, or if the claimant manifested sickness or disease during CNA's period of coverage. (See the declaratory judgment orders).

By its cross motion for summary judgment, and in opposition to CNA's motion, UNR notes that it has settled its claims against Continental, obtained a payment from Continental, and, as a part of a bankruptcy reorganization plan, it has or will transfer 63% of its common stock to a trust for asbestos claimants. UNR contends that these developments require CNA to tender $15 million dollars to UNR in satisfaction of its obligations under its excess policy because the transfer of its common stock into the trust for the asbestos bodily injury claimants constitutes a legally binding settlement that is sufficient to "trigger" CNA's insuring obligations. UNR further contends that the transfer of stock was an obligation imposed by law that resulted in full settlement of the asbestos bodily injury claims, and that it suffered a direct financial loss which entitles it to immediate reimbursement from CNA.

UNR also seeks a ruling that CNA bears the burden of proving that it is not obligated to provided coverage for a claimant under either trigger for asbestos-related insurance coverage liability as delineated in *Raymark*.

UNR does not contest the facts advanced by CNA. Its responses to CNA's statement of facts, as required by Rule 12(f) of the Local Civil Rules of this court, are no more than objections.

II.

DISCUSSION

In its amended complaint, UNR charged CNA with 1) breach of contract by refusing to defend UNR when its primary carriers allegedly refused to honor their obligations; 2) breach of an implied covenant of good faith, and 3) unfair claims practices. UNR also sought declaratory relief. The declaratory judgment rendered by this court court on February 25, 1988, holds that UNR's primary carriers did not breach their insuring agreements.

On November 25, 1988, at the request of UNR and the excess carriers, declaratory relief was granted with respect to how or in what manner primary insurance coverage must be exhausted before UNR can look to the excess carriers for coverage in the form of defense or indemnity. The *Raymark* "double trigger" determines which carriers must respond to particular claims.

The jury found, and the court has ruled, that the so-called Houston Agreements are binding. This court's prior rulings and the data presented by the parties establishes that CNA is not guilty of breach of contract because it had no duty to defend or indemnify UNR during the years when the Houston Agreements were in effect. Moreover, UNR has never contended that its underlying primary insurance was exhausted by the payment of claims. The settlement of the controversy between UNR and its other primary and excess insurance carriers does not change the effect of prior holdings with respect to CNA.

The payment UNR has received in settlement with Continental does not automatically constitute exhaustion of its primary coverage for the purpose of determining CNA's duty to defend or indemnify. It is a condition of the CNA contract that the insured maintain the underlying insurance. "Failure of the insurer to comply with this condition [does] not invalidate the policy, but . . . [CNA] . . . is only liable . . . to the same extent as if the insured had complied with this condition." The plain meaning of the foregoing provision is that UNR (or the trust) must establish exhaustion of the underlying limits by the payment of covered claims before CNA is liable for the payment of claims covered by its contract.

The ruling that UNR's excess insurers had no duty to defend or indemnify while the Houston Agreements were in effect also disposes of UNR's tort claims based on allegations that CNA failed to act when the underlying carriers wrongfully refused to honor their contracts. There is no evidence that CNA misrepresented its policy provisions; failed to effect prompt settlements, compelled policy suits or otherwise engaged in unfair claims practices. There is no showing that

CNA was responsible for UNR's financial losses or ultimate bankruptcy.

UNR has not identified any particular claim or claims which it contends are covered by CNA's contract. Performance of insuring obligations can only be determined in the context of actual claims. UNR's failure to identify specific covered claims relieves CNA of any present liability to respond to those claims. UNR's failure also prevents the court from adjudicating any questions regarding the burden of proof or other matters relating to those claims. UNR's failure to identify such specific claims supports CNA's motion for summary judgment. CNA has no duty to adduce evidence that no such covered claims exist. *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986) (a defendant moving for summary judgement has no duty to negate a plaintiff's claim of exposure to asbestos). Additional declarations establishing criteria for specific claims would be an improper advisory opinion. *See, e.g., Forty-Eight Insulations v. John-Manville Products*, 472 F. Supp. 385 (N.D. Ill. 1979); *UNR Industries, Inc. v. American Mutual Liability Ins. Co.*, No. 82 B 9841-51, slip op. at 17 (N.D. Ill. Bkr. 1988) (1988 Bankr. LEXIS 323).

In opposition to CNA's motion for summary judgment and in support of its motion for summary judgment, UNR relates that it has obtained settlements from all other primary and excess insurance carriers totaling $71.8 million. These settlements were paid directly to UNR and not to any asbestos claimants. UNR, in turn, has entered into a reorganization plan approved by the bankruptcy court pursuant to which it has or will transfer 63% of its common stock to a trust set up to administer asbestos claims. In exchange for its stock, UNR will receive a release of its asbestos tort claims. Claimants must apply to the trust for compensation. The trust will require that proof be submitted before payment will be made. UNR posits that the value of its stock is more than $120 million, and that it has been damaged and injured by the bankruptcy and the transfer by more than this $120 mil-

lion figure. Based on this allegation, UNR contends that it is immediately entitled to receive $15 from CNA.[10]

The transaction by which UNR has conveyed or will convey 63% of its stock to the trust is not a judgment or settlement within the meaning of the CNA policy. That policy specifically provides that no action shall be taken against CNA "unless as a condition precedent thereto, there shall have been full compliance with all the terms of the policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured or by written agreement of the insured, the claimant and [CNA]." UNR's settlement with other insurance companies resulted in a payment only to UNR. The trust mechanism set up by UNR pursuant to bankruptcy reorganization does not constitute a judgment of UNR's obligation to pay. Similarly, the settlement relating to the establishment of the trust does not constitute a "final settlement" with regard to the claims of "the insured, the claimant and [CNA]." Asbestos claimants must apply to the trust and establish their claims before payment will be made to them. Neither UNR nor the trust has yet established a basis for excess liability coverage from CNA.

CNA contends from its review of UNR's claim files that it has not found a sufficient number of settled claims to exhaust all primary coverage for the period of November 1, 1970 to November 1, 1973. It also contends that only 273

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10 In its Disclosure Statement, UNR acknowledges that the transaction does not constitute a payment for tax purposes.

> Generally, a corporation is allowed a deduction for a payment in satisfaction of a tort liability claim at the point in time when the payment is made to the tort claimant. The Tax Reform Act of 1986 added Tax Code Section 468B which provides that for tax deduction purposes, the transfer of a corporation of its stock to a trust in settlement of a class of tort claims made against the corporation is not treated as a payment to the tort claimants. Thus, the Debtor will not be allowed a deduction at the time of the issuance of Creditor Stock in trust in satisfaction of tort claims. In a supplemental submission, UNR asserts that under generally accepted accounting principles, it can treat the stock transfer as a loss on its books even if not for tax purposes.

unsettled cases contain any information suggesting coverage and that, based on historical settlement costs, Continental's coverage and UNR's obligation for primary coverage may be sufficient to meet these claims. CNA states that depending on how much the trustees pay claimants on claims applicable to its coverage, it may become liable to indemnify UNR for payments by the trustees. However, when that will happen and the amounts involved depend upon the future action of the trustees. In the face of these contingencies, CNA's present motion for summary judgment should be granted and UNR's cross motion should be denied. There is no present basis upon which the court can grant declaratory relief.

IT IS THEREFORE ORDERED as follows:

(1) CNA's motion for summary judgment against UNR on the amended complaint against it is granted. UNR's motion for summary judgment is denied.

(2) The Clerk of the Court is directed to enter a judgment on the merits in favor of defendant Continental Casualty Company and against plaintiffs UNR Industries, Inc., et al., dismissing with prejudice the unadjudicated claims for contract, tort and declaratory relief in the amended complaint as to Continental Casualty Company.

ENTER:

/s/ William T. Hart

UNITED STATES DISTRICT JUDGE

Dated: April 30, 1990

FILED
APR 30 1990
WILLIAM T. HART, JUDGE
UNITED STATES DISTRICT COURT

United States District Court

NORTHERN DISTRICT OF ILLINOIS
Eastern Division

UNR Industries, Inc. et al.,

v.

Continental Insurance Co. et al.,

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 85 C 3532

___ Jury Verdict. This action came before the Court for a trial jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Memorandum Opinion and Order, Continental Casualty Co.'s motion for summary judgment against UNR on the amended complaint against it is granted. UNR's motion for summary judgment is denied. Judgment on the merits is entered in favor of defendant Continental Casualty Company and against plaintiffs UNR Industries, Inc. et al., dismissing with prejudice the unadjudicated claims for contract, tort and declaratory relief in the amended complaint as to Continental Casualy Company. All other defendants having previously settled their disputes with plaintiffs' order cause dismissed in its entirety.

April 30, 1990
Date

H. STUART CUNNINGHAM
Clerk
/s/ WILLIAM J. STASIEK
(By) Deputy Clerk

Doc. No.
2111

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge	Hon. William T. Hart	Sitting Judge if Other Than Assigned Judge	
Case Number	85 C 3532	Date	May 18, 1990
Case Title	UNR INDUSTRIES, INC., et al., Plaintiffs, v. CONTINENTAL INSURANCE COMPANY, et al., Defendants		

MOTION: (In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented.)

NATIONAL SURETY'S AND FIREMAN'S FUND'S MOTION TO CORRECT JUDGMENT

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) __ Judgment is entered as follows: (2) X [Other docket entry:]

Moiton of defendant National Surety and Fireman's Fund to correct the April 30, 1990 judgment order is granted. The language in the last sentence of the judgment order which reads, "All other defendants having previously settled their disputes with plaintiffs", is stricken for (sic) the judgment order.

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UNITED STATES DISTRICT COURT

United States District Court

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

UNR Industries, Inc. et al.,

v.

Continental Insurance Co. et al.,

JUDGMENT IN A CIVIL CASE

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___ Jury Verdict. This action came before the Court for a trial jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Memorandum Opinion and Order, Continental Casualty Co.'s motion for summary judgment against UNR on the amended complaint against it is granted. UNR's motion for summary judgment is denied. Judgment on the merits is entered in favor of defendant Continental Casualty Company and against plaintiffs UNR Industries, Inc. et al., dismissing with prejudice the unadjudicated claims for contract, tort and declaratory relief in the amended complaint as to Continental Casualy Company. All other defendants having previously settled their disputes with plaintiffs' order cause dismissed in its entirety.

April 30, 1990
Date

H. STUART CUNNINGHAM
Clerk

/s/ WILLIAM J. STASIEK
(By) Deputy Clerk

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2115

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO.
UNR INDUSTRIES, INC.	CONTINENTAL INSURANCE CO.	85 C 3532 PAGE 105

DATE	NR.	PROCEEDINGS

* * *

05/01/90 2109 Minute order of 04/30/90: Judgment is entered as tollows (sic): Pursuant to Memorandum Opinion and Order, It is ordered as follows: (1) CNA's motion for summary judgment against UNR on the amended complaint against it is granted. UNR's motion for summary judgment is denied. (2) The Clerk of the Court is directed to enter a judgment on the merits in favor of defendant Continental Casualty Company and against plaintiffs UNR Industries, Inc., et al., dismissing with prejudice the unadjudicated claims for contract, Continental Casualty Company (For further detail see order attached to the original minute order form.) Hart, J.
Notice mailed by judge's staff 04/30/90.

2110 Entered 04/30/90: Memorandum Opinion and Order.

DMK 2111 Entered Judgment. Clerk

Continued

PLAINTIFF	DEFENDANT	DOCKET NO.
UNR INDUSTRIES, INC.	CONTINENTAL INSURANCE CO.	85 C 3532 PAGE 106

DATE	NR.	PROCEEDINGS

* * *

05/21/90	2114	Minute order of 05/18/90: Motion of defendant National Surety and Fireman's Fund to correct the April 30, 1990 judgment order is granted. The language in the last sentence of the judgment order which reads, "All other defendants having previously settled their disputes with plaintiffs", is stricken for (sic) the judgment order. Hart, J. Mailed notice 05/21/90
	2115	Entered Corrected judgment. Clerk.
	2116	Filed 05/18/90: National Surety and Fireman's Fund's notice of motion; National Surety's and Fireman's Fund's motion to correct judgment.
05/30/90	2117	Filed 05/25/90: Plaintiff's UNR IND. INC. NOTICE OF APPEAL, from order dated 04/30/90. ($105.00 Paid).

* * *

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90 MAY 25 AM 10:11
CLERK
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNR INDUSTRIES, INC. et al.,

Plaintiffs,

v.

CONTINENTAL INSURANCE COMPANY, et al.,

Defendants.

No. 85 C 3532
(83 A 2523)

Hon. William T. Hart

DOCKETED
MAY 30 1990

NOTICE OF APPEAL

Notice is hereby given that plaintiffs UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., LEAVITT STRUCTURAL TUBING CO., and FOLDING CARRIER CO. hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on the 30th day of April, 1990, and all prior non-final orders and rulings, with respect to the remaining defendants, Continental Casualty Company, National Surety Corporation and Fireman's Fund Insurance Company.

Respectfully submitted,

/s/ RONALD M. OSTER

One of the attorneys for
Plaintiffs and Appellants

Doc. No.
2117

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 85 C 3532 (83 A 2523)

UNR INDUSTRIES, INC., *et al.*,

Plaintiffs,

—v.—

CONTINENTAL INSURANCE COMPANY, *et al.*

Defendants.

MEMORANDUM OPINION AND ORDER

Before the court are various motions for reconsideration of this court's February 25, 1988 memorandum opinion and order, 682 F. Supp. 1434 (N.D. Ill. 1988), as well as other motions filed by parties following the Phase I trial of this case. These motions include (in the order to be discussed): (1) the Rule 59 motion of Corroon & Black; (2) the Rule 59 motion of the primary carriers; (3) Continental Insurance Co.'s ("Continental") motion for summary judgment on unresolved fractional aggregate issues; (4) Continental's separate Rule 59 motion on treatment of post-December 1981 cases; (5) National Surety's and Fireman's Fund's motion to dismiss based on the Phase I jury verdict and UNR's motion for summary judgment against National Surety on contractual liability issues; (6) the effect of the Houston Agreements on the coverage provided by the excess and umbrella insurance carriers; (7) the motions of the excess carriers requesting certain legal rulings with respect to the asbestosis exclusion, the pollution control exclusion; and, (8) as to Home Insurance Co. ("Home"), the effect of the *Tibbets* case. The resolution of these motions completes Phases I and II of this case.

(1) Corroon & Black's Rule 59 Motion

Corroon & Black has moved to amend the February 25, 1988 memorandum opinion and order to strike from that opinion the statement that "Gainer, of C&B, stated that C&B, as UNR's broker, had been less than candid with Continental in 1970 concerning asbestos risks." C&B points out that (1) the exhibit from which the statement appears to have been taken was not admitted into evidence at trials and that (2) in any event, Gainer denied telling Rhodes he had been less than candid with Continental and Rhodes did not remember Gainer stating anything to him in 1975 concerning the 1970 underwriting. Both Continental and UNR agree that the statement contained in the opinion is inaccurate. However, the statement would be correct if modified to refer to the *1973* rather than the 1970 Continental underwriting. Harker Rhodes testified at trial to a conversation with Gainer in September of 1975 in which Gainer states that "perhaps he had been a little less than candid with Continental at the time that he [placed the application for renewal in 1973]." Tr. 3194. In order to more accurately reflect this evidence, which was presented to the jury, and in order to provide appropriate context, the paragraph appearing at 682 F. Supp. 1456 will be amended to read as follows:

> During negotiations with UNR in 1976; Continental advised UNR that it did not believe it was insuring against asbestos claims in 1970 and 1973. It is undisputed that Continental did not charge a premium for asbestos risks in 1970 and 1973. Continental's underwriters were told by C&B only that UNR had gone out of the asbestos business. It was not told that UNR had been sued in 1968 and in 1969 in the *Tomplait*, *Parker*, and *Borel* cases or that UNR and its lawyers anticipated that additional asbestos claims would be made (Tr. 6072-73, PC 13B). Arguably, when UNR obtained coverage from Continental in 1970 it should have given immediate notice of "accidents," but it did not do so. Further, Gainer of C&B, stated that C&B, as UNR's broker, had been less than candid with Continental in

connection with the 1973 renewal of Continental's coverages.

(2) Primary Carriers' Rule 59 Motion

The primary carriers have moved pursuant to Fed. R. Civ. P. 59 to amend the declaratory judgment entered by this court to state explicitly that the issue of costs with respect to the Phase I trial is reserved for a later time, in order to obviate any contention that the primary carriers waived their right to costs by not pursuing them at this time. This motion is granted.

(3) Continental—Fractional Aggregate Issues

Continental has moved for partial summary judgment with respect to certain declaratory issues relating to a 1974 amendatory endorsement to its 1973 policy No. CBP 407271. As originally issued, the 1973 policy was effective November 1, 1973 for the period expiring November 1, 1976. The applicable aggregate limit was $500,000 for "each consecutive annual period comprising the policy period." By an agreed endorsement effective November 1, 1974, the final date of the policy was amended to read December 31, 1976. The endorsement reads: "IN CONSIDERATION OF A CASH ADDITIONAL PREMIUM OF $21,132, THE ANNIVERSARY DATE OF THIS POLICY IS AMENDED TO READ DECEMBER 31. THE EXPIRATION DATE OF THE POLICY IS AMENDED TO READ DECEMBER 31, 1976." The endorsement by its terms, makes no reference at all to the effect of the additional two-month period on the aggregate limits for the first annual period.

Continental takes the position that the 1974 amendment resulted in a first annual period of fourteen months with a single aggregate limit of $500,000. It contends that the policy effective from November 1, 1973 to December 31, 1976 consists of three periods of $500,000 products aggregate limits each, for a total of $1,500,000 aggregate limits. UNR, in its cross-motion for summary judgment on this same issue con-

tends that the 1974 endorsement created a new or additional two-month period from November 1, 1974 to December 31, 1974 with a new $500,000 products aggregate, for a total of $2,000,000 aggregate limits.

The starting point for analysis must be the language of the endorsement itself, which by its terms, nowhere creates a new period. The language changed the anniversary date from November 1 to December 31. UNR acknowledges that the endorsement is silent as to any effect on aggregate limits.[1]

Previously, in its memorandum opinion and order of February 25, 1988, this court considered the question of aggregate products coverage for periods of less than one year with respect to both First State and Zurich. The circumstances surrounding the fractional period of Continental are similar in many respects to those of First State and unlike those of Zurich. Like First State, Continental provided UNR with a single policy which provided coverage extending through three annual periods. (Zurich, by contrast, issued three policies for periods shorter than one year, and later cancelled each of the policies. Continental never cancelled any of its policies with UNR.) Like First State, Continental charged a *pro rata* premium to UNR; Continental's two-month policy extension was priced on exactly the same basis as First State's—1/6 of a full-year's estimated premium in exchange for the additional two-month period of time. Also like First State, Continental set out the anniversary date in its policy, and required premiums to be paid on the anniversary date. As previously noted, an "annual period" need not be limited

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1 UNR's objections to Continental's arguments on the fractional aggregate issue are based largely on a contention that the policy is clear and unambiguous on its face, making resort to parol or extrinsic evidence of the type presented by Continental improper. Continental's evidence is not, however, offered to contradict or alter the terms of the endorsement, but rather, is offered only to place the parties' actions surrounding the execution of the endorsement in context. As UNR admits, the endorsement is completely silent on the question of what effect it has on aggregate limits. UNR's arguments concerning the inadmissibility of extrinsic evidence are therefore misplaced. As it turns out, however, the extrinsic evidence is not necessary for a resolution of this question.

to a period of exactly 365 days. Here, as in the case of First State (and unlike the situation with Zurich), to regard the Continental policy as having four anniversary periods and therefore four aggregates would be contrary to its very terms.

The additional fractional premium referred to in the endorsement is clearly stated to be in consideration of the change in the anniversary date to December 31—an additional two months. As already noted, that is a simple *pro rata* addition based on the two additional months involved.[2] Because the risk increases over time as operations continue, Continental was entitled to receive consideration for that increased risk of loss. UNR argues that the products coverage by the two-month extension would be illusory unless creation of a new two-month annual period with a $500,000 aggregate is implied. It argues that if $500,000 were paid on a claim allocable to the two-month extension, the payment would exhaust all coverage for the liabilities that had occurred for a fourteen month period. But that is inherent in the nature of insurance policies. In this respect, a 14-month policy works the same way a 12-month policy does: as claims are paid, the aggregate limit is reduced, and when the aggregate is exhausted by payment, the carrier's obligation for products claims ceases.

UNR's premise that Continental's risk is defined in terms of amount (aggregate limits) and time (policy period) ignores the fact that Continental's policy provided coverage for many risks other than the products hazard. Even if the two-month extension had provided no products coverage, Continental was exposed to a wide variety of risks. Under UNR's theory of premium calculation, Continental would have charged no premium for that coverage. When Continental made coverage

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2 UNR argues that the additional premium charged for the two-month extension would have been "far less" if Continental had intended to spread the $500,000 aggregate over a 14-month period. But the evidence is that the premium paid by UNR for the additional two-month policy period was $21,132.00, or approximately 1/6 of the premium paid for the first 12-month policy period ($128,029.00). In logic, the argument should be that this premium leads to an implied fractional aggregate of $83,333.

available to UNR for an additional two-month period, it did in fact put new dollars at risk, contrary to UNR's assertion.

UNR also points to the fact that the endorsement used the term "anniversary date," which term is not explicitly linked in the policy to the term "annual periods." UNR claims "anniversary date" has significance only for purposes of the mechanics of premium recalculation and payment. UNR argues that this shows that Continental failed clearly and unambiguously to provide that the scope of the aggregate limit would be defined and limited solely by the anniversary date and that the annual period for purposes of determining aggregate limits was not extended by the change in the anniversary date. While it is true that the endorsement is remarkably short, the language actually used did not alter the annual period $500,000 aggregate limit. The endorsement is an amendment of the anniversary date to extend an annual period rather than an amendment to create a new period with an additional implied $500,000 aggregate limit.

Continental contends that the single 14-month policy period also applies for purposes of the special 4% formula provided in the Houston Agreement between Continental and UNR for the application of Continental's policies to asbestos cases first reported during 1980 and 1981. Under this interpretation, the Continental policies would be applied to asbestos bodily injury cases first asserted between January 1, 1980 and December 31, 1981 to the extent of 4% of the costs and losses for such policy period during which exposure to UNR asbestos products is claimed, subject to applicable deductibles for those years contained in the Houston Agreement. Continental urges that for purposes of applying the 4% formula to Continental's policies, there are a maximum of nine Continental policy periods in connection with the 1980 agreement, one being the policy period from November 1, 1973 to December 31, 1974. UNR apparently does not specifically object to the adoption of this interpretation, and the interpretation is supported by the record. Continental is therefore

entitled to summary judgment on the 14-month policy period issue.

(4) Continental's Separate Rule 59 Motion on Post-December 1981 Cases

Continental also has moved separately to amend the declaratory judgment to eliminate the declaration in Section III(1) of the order that requires Continental to indemnify or defend asbestos-related bodily injury claims first reported or filed after December 31, 1981. The court's determination that Continental (along with Zurich and Bituminous) was obligated with respect to post-December 31, 1981 cases was based on a straightforward application of the Illinois Supreme Court's decision in *Zurich Insurance Co. v. Raymark Industries, Inc.*, 118 Ill. 2d 23, 514 N.E.2d 150 (1987), which govern any claims filed after the Houston Agreements expired. Continental, however, contends that there is no basis for applying *Raymark* or any other "trigger of coverage" theory with respect to its coverage for UNR asbestos bodily injury claims. Continental's position is apparently that such cases are covered, if at all, only if they were reported between November 1, 1970 and December 31, 1981, because the 1980 Houston Agreement was terminated in December of 1981. According to Continental, this termination effectively eliminated any obligation of Continental to provide any coverage for asbestos claims brought after that date.

Continental, however, has suggested no valid reason why, when the Houston Agreements ended, the parties were not instead bound by the policies of insurance Continental sold to UNR. Those policies contain standard form policy language which must be interpreted in accordance with the construction adopted in *Raymark* as to any remaining coverage.

Significantly, the Continental policies themselves contain no restriction on the post-1981 cases. The 1976 and later policies may contain deductible endorsements, but those endorsements do not incorporate or even mention the Houston Agreements. If Continental had intended its policies to provide coverage only according to the terms of the Houston

Agreements, it should have endorsed its policies to so state. Each Continental policy specifically provides that changes can be made only by endorsement and in no other manner.

Continental argues that it is in a somewhat different position from Zurich and Bituminous with respect to cases first reported after December 1981, since unlike either of those primary carriers, it had a "no coverage" dispute with UNR with respect to its 1970-75 policies. In this connection it is useful to review the background of the negotiations leading to the Houston Agreements entered into between Continental and UNR. The Houston Agreements were entered into for the purpose of both resolving coverage disputes and administering thousands of claims by stating what the primary carriers would be obligated to pay on asbestos cases under those policies. The Houston Agreements resolved the trigger of coverage questions in place of perceived legal uncertainties and established litigation procedures for determining if and when there would be an asbestos-related "bodily injury" caused by an "occurrence" during the policy period. The agreements did not modify the nature of the primary coverage provided but rather determined a method of administration which did not require controverting the date when a plaintiff claimed injury occurred.

After 1979, UNR did not request, and Continental did not issue, any products liability insurance applicable to asbestos claims. Continental, however, consented to an agreement proposed by UNR in 1980 concerning asbestos cases first reported on or after January 1, 1980. By virtue of that agreement, Continental was to make available its remaining 1970-79 product liability aggregates for UNR's benefit and to apply to a limited extent its 1970-79 policies to bodily injury asbestos claims first asserted during the term of the agreement. Also beginning in 1980, UNR took over the responsibility for handling pending and later-filed asbestos cases. The 1980 understanding was terminated by UNR effective December 31, 1981.

Continental's position is thus that as a result of the 1980 agreements, its remaining 1970-79 aggregates were made available for cases reported during 1980 and 1981 to the lim-

ited extent provided in that agreement, and that *but for* the 1980 agreement, there would be no coverage at all for asbestos cases reported after 1979. Continental argues that UNR's termination of the 1980 Houston Agreement ended all Continental coverage for subsequent cases reported after the date of termination. For Zurich and Bituminous, by contrast (Continental argues), there are a universe of cases for which coverage under *their* policies, unamended by the Houston Agreements, *should* logically be governed by *Raymark*.

But the fact that the Houston Agreements between Continental and UNR were originally entered into in order to resolve a dispute over coverage and administration (or induce the issuance of new coverage) lends no support to Continental's position with respect to post-December 31, 1981 cases. Although the Houston Agreements served to resolve that dispute during the life of the agreements, some of the legal uncertainties attending the negotiation of the Houston Agreements were removed in the interim by the Illinois Supreme Court's decision in *Raymark* so that after the expiration of those agreements, *Raymark* provides the applicable legal framework.

Since the end of the Houston Agreements, UNR has been presented with asbestos claims that include allegations which could trigger Continental's coverage under *Raymark*. Although the later policy years may include deductibles, the unexhausted product aggregates of the policies can and should respond to those claims under Illinois law. Continental has pointed to nothing in *Raymark* itself or in the language of its policies which would exempt it from the holding of that case. Continental has a continuing obligation to perform consistent with the *Raymark* coverage standard for cases filed after December 31, 1981.

To the extent that Continental is required to cover UNR for any post-December 31, 1981 asbestos bodily injury claims, however, its obligation for defense or indemnity is subject to the satisfactory resolution of UNR's obligation to fund any policy per-claim deductibles in Continental's 1976,

1977, 1978 and 1979 policies.[3] This court's declaration will state that to the extent Continental is required to provide coverage to UNR with respect to post-December 31, 1981 claims, its obligations are subject to the satisfaction by UNR of any obligation to fund any policy deductibles, apart from which, under *Raymark*, Continental or any other primary carrier on the risk is required to provide a defense and pay up to its unexhausted limits for the period.

(5) National Surety's and Fireman's Fund's Motion to Dismiss and UNR's Motion for Summary Judgment on Contractual Liability Issues

National Surety and Fireman's Funds[4] have moved for dismissal from the action on the basis of the jury's verdict in Phase I, which found that UNR failed to prove it had coverage from National Surety and failed to prove a valid excuse for its delay in giving notice of accidents and claims. This motion is granted.

The finding against UNR on the notice of accident issue logically precludes any claim of coverage for all of UNR's asbestos claims—past, current or future. Any policies from the 1940's would have applied only to accidents that occurred during the policy periods, and UNR did not give notice to National Surety until decades later, in 1983. Since UNR failed to prove a valid excuse for the delay, all coverage for asbestos-related accidents that occurred in the 1940's is precluded. In addition, the verdict on the existence issue also obviates the possibility of any products coverage on the part of National Surety.

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3 During the trial, UNR disputed the existence of a $15,000 deductible for asbestos-related claims in Continental's 1976 policy. On May 5, 1987, the question was reversed for later consideration. The issue of a 1976 policy asbestos-related deductible is, however, moot because the court has concluded, *infra*, that Continental exhausted its coverage for 1976 by paying a judgment in the *Tibbets* case.

4 Fireman's Fund is a party to the case only because it is the parent of National Surety. For purposes of simplicity, references here will be made solely to National Surety.

UNR argues that these rulings do not preclude recovery from National Surety because it had "contractual liability" insurance which applies to all newly-filed and future asbestos claims, based on a theory of breach of warranty. It is true that the issue of contractual liability insurance was not necessarily resolved by the Phase I trial. National Surety had moved *in limine* to prevent UNR from raising its contractual liability insurance claims during Phase I; this court granted that motion, but stated that any legal issues with respect to this matter would be considered after trial. (Given this procedural history, National Surety's claim that UNR waived its right to contractual coverage because it did not make an offer of proof at trial is without merit.) Now, in its motion to dismiss, National Surety reiterates the arguments with respect to contractual liability insurance previously raised in its motion *in limine*. UNR, simultaneously, has moved for summary judgment in its favor on the contractual liability insurance issue.

First, UNR has inexcusably delayed in raising the issue of contractual liability insurance, UNR asserts that because it did not restrict the allegations of coverage in its complaint to "products liability" coverage but rather alleged that it had "primary liability insurance," it sufficiently put National Surety on notice of its contractual liability theory. But the complaint never mentioned the words "contractual liability" insurance. This in itself might not have been fatally deficient under the liberal rules of federal notice pleading, but UNR waited until March 20, 1986 to first mention this specific type of coverage—almost three years after the dispute began, more than one year after the close of discovery on the expedited issues, and four months after a discovery cut off. UNR's assertion of its contractual liability theory for the first time in the final pretrial order simply came too late.

In addition to the fact that UNR's assertion of its contractual liability theory is untimely, UNR simply cannot show that there is a remaining triable issue that it in fact *had* contractual liability insurance. The only evidence there is on the existence of such insurance is three certificates of insurance,

two of which show contractual liability insurance and one of which expressly shows that UNR did *not* have such insurance. (These certificates are the same as those received in evidence at the trial on the issue of products liability coverage.) Significantly, it is this third certificate which UNR's ancient document expert testified was prepared last and was the most complete and reliable. UNR strenuously argued for the admission into evidence of this third certificate based on its authoritativeness, and won on this issue over the objection of National Surety. Since the issue was determined in favor of authenticity, UNR cannot now assert that the document is unreliable.[5]

At the trial UNR contended, based on the same certificates of insurance, that National Surety issued two comprehensive general liability policies covering the period April 1, 1945 to January 1, 1949 which included products liability insurance. It is these same policies which UNR now contends also contained contractual liability insurance. Although not specifically focusing on contractual liability coverage, the jury found that UNR did not prove the existence of such policies and also considered whether UNR had a valid excuse for failing to give timely notice of accidents and claims to National Surety (Verdicts 1, 2 and 3). Although it is arguable that the jury answered Verdicts 1 and 2 in the negative because of a failure of proof on the products hazard provision, the same interpretation cannot apply with respect to Verdict No. 3, finding that UNR did not prove "by a preponderance of the evidence that it had a valid excuse for not giving prior notice of accident(s) and claim(s) or suit(s) to National Surety before 1983 and that National Surety was not prejudiced by the timing of this notice."

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5 UNR now cites and relies on National Surety's earlier argument against the authenticity of the third certificate, suggesting that it is National Surety which should now be precluded from shifting its reliance. UNR's argument, however, overlooks the fact that the issue of authenticity was ultimately resolved in its own favor, and the document admitted into evidence. Thus it is UNR, rather than National Surety, that is precluded from changing its position.

UNR argues that the jury's notice findings only relate to claims pending as of 1983 and do not apply to any claims filed after 1983, when UNR gave notice to National Surety. Since it is now giving timely notice to National Surety as new claims are being filed, UNR argues, National Surety has suffered no prejudice as to recently-filed and future claims. UNR also claims that there is no way it can provide any specific information to National Surety required by the notice of accident provision in the policy until an asbestos claimant actually files a claim. However, UNR's contention that the notice of accident issue (as opposed to notice of claims issue) was not determined by the jury is contradicted by the record. The "notice" instruction given to the jury clearly encompassed the rules for proving a valid excuse for a delayed notice of accident, and that issue was necessarily determined against UNR. In any event, the 1983 notice was relied on by UNR to provide both notice of accident and notice of claim; if that notice was too late for products claims filed between 1968 and 1982, it necessarily follows that it was also too late for all accidents—giving rise to contractual liability claims—that occurred before 1983.

UNR's argument that it cannot give notice of accident for claims until it knows with certainty all the names and addresses of the persons it has injured, as well as all other particulars, is without merit. To give notice of accident does not require that the insured be able specifically to identify everyone it has injured. The notice condition requires the identity of the injured and other details only if the information is "reasonably obtainable." An insured should not be able to delay giving notice simply by arguing that it injured thousands of unidentified persons instead of only one known person. As National Surety properly points out, acceptance of UNR's theory would lead to the illogical result that the more devastating the injurious events the longer an insured has to give notice. Also, acceptance of UNR's theory would deprive an insurer of any opportunity to investigate promptly accidents out of which claims might arise.

UNR finally restates its argument that National Surety had "actual notice" of accidents because, by its own admissions

it knew when it issued its policies during the 1940's both that asbestos was dangerous and that UNR manufactured asbestos products. But this court has already rejected this same argument on numerous other occasions. The law is clear that an "actual notice" theory cannot be asserted unless the notice relied on actually informed the insurer that its particular insured was seeking coverage under a policy issued by the insurer to the insured. *See Hartford Accident & Indemnity Co. v. Gulf Insurance Co.*, 776 F.3d 1380, 1383 (7th Cir. 1985). UNR simply has not presented evidence of any such pre-1983 notice to National Surety and thus, again, can establish no basis for contractual liability coverage.

National Surety has also asked the court for a formal finding that all of UNR's claims against it, including its claim for contractual liability insurancee are barred by laches. National Surety earlier requested a finding of laches at the conclusion of all the evidence and after the jury's verdict, but the court did not rule at that time. UNR argues that it is entitled to a jury trial on the issues of laches, but the cases it cites in support of that proposition say no such thing. The law is clear that laches is a question for the court to determine based on all the evidence presented. *Lingenfelter v. Keystone Consolidated Industries, Inc.*, 691 F.3d 339, 341 (7th Cir. 1982); *Blue Ribbon Feed Co., Inc. v. Farmers Union Central Exchange, Inc.*, 731 F.3d 415, 420 (7th Cir. 1984).

To establish the affirmative defense of laches, the burden is on the defendant to show: (1) that the plaintiff knew of or in the exercise of due diligence should have discovered his rights long before filing his claim; and (2) prejudice resulting from the delay. *Pyle v. Ferrell*, 12 Ill. 2d 547, 147 N.E.2d 341, 345 (1958); *Robin v. Tauber*, 45 Ill. App. 3d 831, 360 N.E.2d 368, 372-73 (1976). Prejudice is proven if the defendant shows the loss of material evidence relating to the claim asserted. *Pyle, supra* at 345. Here, UNR's claim was based on documents which were easily located in 1983. Asbestos claims had been made since 1968. A diligent search of UNR's files long before 1983 would have located those documents, but no such search of UNR's files was made in 1969 when inquiries into coverage were made. By 1983, the policies were

missing and various witnesses had either died or experienced a fading of memory. Based on these facts, both unreasonable delay and prejudice have been established, and National Surety is entitled to a finding of laches barring all of UNR's claims of coverage, including its claim for contractual liability insurances.

Since notice of accident given in 1983 was too late, there can be no coverage for any asbestos-related accidents that occurred during the alleged policy periods 1945-48. Thus, even assuming the existence of insurance during those periods, UNR's claim for coverage against National Surety is necessarily barred. UNR's claims against National Surety and Fireman's Fund will be dismissed with prejudice and UNR's motion for summary judgment against National Surety on its contractual liability theory will be denied.

(6) Effect of the Houston Agreements on the Coverage Provided by the Excess and Umbrella Carriers

Continental Casualty Company ("CNA"), Home Insurance Company ("Home"), Northbrook Insurance Company ("Northbrook"), and First State Insurance Company ("First State") provide various layers of excess and excess umbrella products insurance to UNR for the period November 1, 1970 to December 31, 1977. CNA issued a policy with three annual periods from November 1, 1970 to November 1, 1973 providing $5 million products coverage in in each period in excess of $500,000 provided by Continental Insurance Company ("Continental"). Home issued a policy with three annual periods November 1, 1973 to December 31, 1976 providing $7.5 million of products coverage in each period in excess of Continental's primary coverage of $500,000. Northbrook issued two policies: one for the period November 1, 1976 to December 31, 1976 in the amount of $5 million in excess of Home and one for the period December 31, 1976 to December 31, 1977 in the amount of $7.5 million in excess of Continental. First State issued one excess umbrella products policy for three annual periods from November 26, 1974 to December 31, 1977 in the amount of $2.5 million for each policy

period. For the period from November 26, 1974 to December 31, 1976 its policy is in excess of Home and for the period December 31, 1976 to December 31, 1977 its policy is in excess of Northbrook.

The excess carriers[6] argue that until a primary carrier has paid the full amount of its underlying policy, no excess carrier has any obligation to pay for losses. Since Continental, the underlying carrier, has not yet exhausted its limits for the years 1970 through 1979, they contend that they have no obligation to UNR. UNR argues that under the terms of the excess contracts its obligation was to obtain $500,000 in primary products coverage from Continental for each annual period which it did. It contends that after the combined payment in any annual period of $500,000 in losses either by Continental or UNR (by the payment of deductibles), an excess carrier has an obligation under the terms of the excess contracts to indemnify UNR to the extent of its coverage.

The excess carriers also contend that the deductibles negotiated between UNR and Continental as a part of a Houston Agreement affect their obligation to pay excess coverage. Home also contends that any deductible in a Continental policy would be applicable to all claims covered by Home after Continental's coverage is exhausted by payment of claims.

The excess carriers were not parties to the Houston Agreements. The only excess policies issued after a Houston Agreement are the policies issued by Northbrook.

The question of how a provision or a deductible requirement made a part of a primary carrier's policy affects or is incorporated into an excess contract must be determined by an examination of the terms and conditions of the excess insurance contract. The language in an insurance policy must be interpreted according to its plain and ordinary meaning. *Dora Township v. Indiana Insurance Co.*, 78 Ill. 2d 376, 400 N.E.2d 921, 922 (1980). When an agreement is unambiguous, its meaning must be determined from the face of the instrument. *Kolar v, Ray*, 142 Ill. App. 3d 912, 492 N.E.2d 899,

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6 CNA does not join in all of the contentions of the other excess and umbrella carriers who for convenience are referred to as the "excess carriers."

902 (1986). Unless the court first determines that a contract term is ambiguous, extrinsic or parol evidence is not admissible. *Sunstream Jet Express, Inc. v. International Air Service Co., Ltd.*, 734 F.2d 1258, 1267-68 (7th Cir. 1984) (Illinois law). No party argues that the excess contracts are ambiguous.

The applicable contract provisions as they appear in the excess and umbrella contracts are essentially the same. The Home contract provides as follows:

> I. *Coverage*
>
> The company hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of liability . . . for damages, direct or consequential and expenses, all as more fully defined by the term "ultimate net loss" . . . .
>
> II. *Limit of Liability*
>
> The company shall only be liable for the ultimate net loss the excess of either
>
> (a) the limits of the underlying insurances as set out in the attached schedule in respect of each occurence covered by said underlying insurances, or
>
> (b) $10,000 ultimate net loss in respect of each occurrence not covered by underlying insurances (hereinafter called the "underlying limits").
>
> * * *
>
> In the event of reduction or exhaustion of the aggregate limits of liability under said underlying insurance by reason of losses paid thereunder, this policy shall
>
> (1) in the event of reduction pay the excess of the reduced underlying limit;
>
> (2) in the event of exhaustion continue in force as underlying insurance.
>
> * * *

Definitions

6. *Ultimate Net Loss*

The term "Ultimate Net Loss" shall mean the total sum which the Insured, or any company as his insurer, or both, become obligated to pay by reason of personal injury, property damage, or advertising liability claims, either through adjudication or compromise . . . .

The company shall not be liable for expenses as aforementioned when expenses are included in other valid and collectible insurance.

* * *

Conditions

J. *Loss Payable*

Liability under this policy with respect to any occurrence shall not attach unless and until the Insured, or the Insured's underlying insurers, shall have paid the amount of the underlying limits on account of such occurrence.

* * *

Q. *Maintenance of Underlying Insurance*

It is a condition of this policy that the policy or policies referred to in the attached "Schedule of Underlying Insurances" shall be maintained in full effect during the currency of this policy except for any reduction of the aggregate limit or limits contained therein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this policy. Failure of the Insured to comply with the foregoing shall not invalidate this policy but in the event of such failure, the company shall only be liable to the same extent as they would have been had the Insured complied with the said conditions.

By an endorsement to each policy a schedule of underlying insurance identifies a continental policy providing $500,000 aggregate products liability bodily injury coverage.

Northbrook's contracts differ from the Home contract only with respect to a $25,000 rather than a $10,000 "retained limit" for occurrences not covered by underlying insurances but covered by the excess contracts. The retained limit is an obligation of the insured and is analogous to a deductible. Northbrook's contracts also contain schedules identifying the underlying coverages.

The excess carrier's liability to the insured depends upon whether the underlying carrier has exhausted the limits of its underlying insurance. As noted, the language of the excess contract is that in the event of "exhaustion [or reduction] of the aggregate limits of liability under said *underlying insurance* by reason of losses paid thereunder," the excess policy shall continue as underlying insurance. The definition of "ultimate net loss" contains the statement that the excess carrier "shall not be liable when coverage is included in *other valid and collectible insurance*"—which would be the case before the underlying carrier has exhausted its liability for payment of losses. The "loss payable" condition contains the statement that liability "shall not attach until the Insured, or the Insured's underlying insurers, shall have paid the amount of the *underlying limits* on account of such occurrerce." This policy language indicates that the excess carrier has no responsibility so long as the underlying carrier is responsible for the payment of any losses for any policy period. This language precludes the contention of UNR that it is entitled to excess coverage after the combined payments by it *and* the underlying carriers exceed $500,000. It is only after underlying coverage is exhausted that an excess carrier can be required to respond under its contract. Exhaustion of the underlying limits will only occur in any policy period after UNR has funded any applicable deductible and the primary carrier has paid out its underlying limits. *Illinois Emcasco Ins. Co. v. Continental Casualty Co.*, 93 Ill. Dec. 666, 487 N.E.2d 110 (1st Dist. 1985).

Home notes that it will provide "underlying insurance" after exhaustion of the underlying carriers' limits. Consequently, the argument runs, Home is entitled to apply any deductible contained in the primary carrier's policy to each claim it covers. This argument is without support in the excess contract and is rejected. There is only one retention requirement in the Home contract and that is with respect to occurrences not covered by underlying insurance—not a circumstance in this case. *Pacific Power & Light Co. v. Transport Indemnity Co.*, 460 F.2d 959, 962 (9th Cir. 1972); *Home Ins. Co. v. Certain Underwriters at Lloyds, London*, 729 F.2d 1132, 1134 (7th Cir. 1984).

From November 1, 1976 through December 31, 1976, UNR self-insured a $500,000 so-called buffer layer between its primary coverage of $500,000 and Home's excess umbrella coverage. Northbrook contends that because UNR's primary coverage contained a deductible for asbestos claims, UNR's $500,000 self-insured buffer layer also implicitly contained a deductible. No contract of Northbrook's and no other document indicates that UNR intended to impose upon itself a deductible in the buffer layer. The contention of Northbrook is rejected.

The Houston Agreements were year to year agreements between UNR and its primary carriers which resolved questions concerning the interpretation of the primary insurance contracts and implemented decisions with respect to the administration of thousands of claims. No excess carrier contends that the agreements were entered into in bad faith or as a disguised attempt to draw upon the excess insurance coverage, nor did the evidence it the trial show this to be the case. Home Insurance Company argues, however, that the Houston Agreements changed the underlying primary coverage from "occurrence" type claims to "claims made" policies, and that all claims so processed must be reallocated to determine the application of excess coverage which is on an occurrence basis. This is not a correct interpretation of the Houston Agreements.

Faced with thousands of claims against multiple defendants, UNR and its primary carriers chose to accept the claimants allegations as to period of exposure or injury without directly challenging those allegations. This does not change the nature of the insurance provided; it does not entitle the excess carriers to require that UNR undertake a new investigation to prove or disprove the truth of those allegations, and it does not require a reallocation of underlying insurance payments. The litigation decisions of UNR and the primary carriers are not subject to such an attack or construction. There is no showing that these decisions were not in good faith or that they do not correctly reflect the application of the underlying contracts.

There is, however, one respect in which UNR may not be able to take full advantage of the primary coverage payments under the Houston Agreements so as to bring into effect the coverage provided by the excess carries: The effect of the Illinois Supreme court's decision in *Zurich Ins. Co. v. Raymark Industries, Inc.*, 118 Ill. 2d 23, 514 N.E.2d 150 (1987) is that an insurer is only obligated to cover asbestos-related bodily injury claims which involve a loss that occurred during a year when that insurer's coverage is in effect. *Raymark* adopted a "double trigger" of Coverage: asbestos-related bodily injury losses occur during exposure—when a claimant inhales asbestos fibers and when the claimant suffers sickness or disease—manifestation. Payments by a primary carrier, if any, made solely on the basis of liability for injury during the period between exposure and manifestation as a result of a Houston Agreement—the so-called "exposure in residence" period—cannot be applied toward exhaustion of the underlying coverage. With this exception, all payments on claims made by the primary carriers count toward exhaustion of the underlying coverage and reallocation is not required.

The excess carriers also argue that underlying coverage must be entirely exhausted before any excess carrier can be liable. This is not correct. The primary and excess carriers have written coverage for terms of more than one year with annual policy periods. Underlying coverage is required for annual policy periods. Under the terms of these contracts

when underlying coverage is exhausted for any annual period, liability will exist under the terms of an excess policy. It is not necessary that underlying coverage be exhausted for an entire policy period before any claim can be made against an excess carrier.

(7) Other Contract Exclusions

(A) The Asbestosis Exclusion

The 1977 Northbrook policy contains the following endorsement:

> In consideration of the premium charged it is agreed that coverage under this policy shall not apply in the case of any claim arising out of ASBESTOSIS.

Northbrook contends that the exclusion applies to exclude coverage for all claims arising from all asbestos-related diseases. It states that in 1976 asbestos-related claims were referred to by non-medical persons under the general category of asbestosis. UNR contends that the plain meaning of the exclusion is that it excludes only claims arising from the specific disease known as asbestosis and does not exclude claims arising from other asbestos-related diseases such as mesothelioma and bronchogenic carcinoma. Neither UNR or Northbrook contend that the language of exclusion is ambiguous.

UNR is not attempting to deny Northbrook the benefits of the exclusion. In many cases the exclusion will be applicable. However, UNR Objects to applying the exclusion to eliminate all coverage for *all* asbestos-related injuries.

Although Northbrook and UNR contend that the policy is unambiguous, Northbrook premises its argument on its version of extrinsic evidence. As a matter of law, when the policy is plain on its face, "no extrinsic or parol evidence is presented to the trier of fact." *Sunstream Jet Express, Inc. v. International Air Service Co., Ltd.*, 734 F.2d 1258, 1268 (7th Cir. 1984) (Illinois law). Additionally, since Northbrook seeks to exclude coverage, it bears the burden of showing a "clear,

definite and explicit" exclusionary provision. *Playboy Enterprises, Inc. v. St. Paul Fire & Marine Insurance Co.*, 769 F.2d 425, 428 (7th Cir. 1985) (Illinois law). The exclusion is "clear, definite and explicit" in one sense: claims arising from the disease "asbestosis" are excluded.

The extrinsic evidence of the parties' intent is, at best, conflicting and inconclusive. A representative of Northbrook testified that the exclusion applied only to the disease asbestosis. UNR's witnesses have stated they often used the term "asbestosis" loosely to refer to other asbestos-related diseases. However, neither party provided testimony regarding *mutual* intent at the time the endorsement was issued. The court cannot infer that UNR's intent was to restrict coverage; nor can it find that Northbrook has shown a "Clear, definite and explicit" exclusion. See *State Farm Mutual Automobile Insurance Co. v. Schmitt*, 94 Ill. App. 3d 1062, 419 N.E.2d 601, 603 (1981) (it is insurer's burden to show that a claim falls within an exclusion since it is presumed that insured intended to obtain coverage).

UNR argues that in the event of ambiguity, it can demonstrate that its interpretation of the asbestosis exclusion is reasonable inasmuch as Northbrook's own personnel believe that it can reasonably be construed to apply only to asbestosis. It is not necessary, however, to resolve this issue based on extrinsic evidence. The language of the exclusion is not ambiguous. Northbrook's policy excludes claims arising from "asbestosis," a respiratory disease that has been specifically recognized in workers' compensation statutes, lay dictionaries, the medical profession and the insurance industry. In *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1083-85 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1973), a leading case in this area, the Fifth Circuit stated, some three and one-half years before Northbrook's policy was issued, that asbestos inhalation causes both asbestosis, a respiratory ailment, as well as mesothelioma, a cancer. The court stated:

> The medical testimony adduced at trial indicates that inhaling asbestos dust in industrial conditions, even with

> relatively light exposure, can produce the disease of asbestosis.
>
> * * *
>
> A second disease, mesothelioma, is a form of lung cancer caused by exposure to asbestos.
>
> * * *
>
> Asbestosis has been recognized as a disease for well over fifty years.

493 F.2d at 1083.

"Asbestosis" was defined in Webster's Third New International Dictionary (1976) (the year before Northbrook issued its policy), as "a form of pneumoconiosis caused by the inhalation of fine particles of asbestos." Webster's (1976) defines "pneumoconiosis" as "a disease of the lungs caused by the habitual inhalation of irritant mineral or metallic particles—Compare ANTHRACOSIS, SILICOSIS." Webster's (1976) defines "mesothelioma" as "a tumor derived from mesothelial tissue (as that lining the peritoneum or pleura)." Asbestosis is not a term that was used in 1976 or earlier to describe all asbestos-related diseases.

Before Northbrook issued its endorsement, the separate and distinct diseases associated with asbestos inhalation were recognized by judicial decisions, medical authorities, and lay dictionaries. A sophisticated party such as an insurance company must be presumed to be aware of such distinctions. Accordingly, the policy is clear on its face—only claims arising from asbestosis are excluded.

First State is a "follow-form" carrier. It relies entirely on the terms and conditions of underlying policies to define its insuring obligations. Among the provisions that First State incorporated in its last policy year was the 1977 Northbrook "asbestosis exclusion." UNR does not contest First State's right to use this exclusion to exclude claims arising from the disease of "asbestosis." First State's policy was issued on November 26, 1974, more than two years prior to the inclu-

sion of an "asbestosis exclusion" in an underlying policy. All of First State's calculations of risk, premiums, and the entire basis of its bargain, were determined without regard to this exclusionary provision. There is no evidence that First State, even in 1977, relied on Northbrook's exclusionary clause in any direct manner. For the reasons previously stated, the all encompassing construction suggested by Northbrook is also rejected as to First State's policy.

(B) The Pollution Exclusion

Endorsement No. 2 to Home's excess umbrella policy, effective from November 1, 1973 through December 31, 1976, consists of a "Contamination and Pollution Exclusion" ("pollution exclusion"). The pollution exclusion states:

> CONTAMINATION AND POLLUTION EXCLUSION
>
> In consideration of the premium charges, it is understood and agreed that such insurance as is afforded by this policy does not apply to Personal Injury or Property Damages arising out of the discharge, dispersal, release or escape of smoke vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gas, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is neither expected nor intended by the Insured.
>
> It is further understood and agreed that in no event shall coverage provided by this policy for Contamination and Pollution be broader than that provided by the Underlying Insurance set forth in the Schedule of Underlying Insurances.

The underlying insurance policy to Home's excess policy was issued to UNR by the Continental Insurance Company, effective November 1, 1973 to December 31, 1976. A pollution exclusion in the Continental primary policy states:

> This insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.[7]

Home contends that the pollution exclusion may bar coverage as to certain asbestos-related claims that have been brought against UNR. Home points to no specific claim on which it denies coverage, but contends that such a claim may arise. Accordingly, some requests that the court make no ruling on the impact of the pollution exclusion until there has been a specific denial of an individual claims.

UNR has moved for judgment on the pleadings. UNR contends that the pollution exclusion does not bar coverage for any bodily injury asbestos claim that has been brought against UNR. UNR further notes that Home has had access to UNR's claims files for many years, has been involved in asbestos litigation on behalf of other insureds in thousands of asbestos cases, and has not pointed to a single claim against UNR that it contends is precluded by the pollution exclusion.

UNR contends that the pollution exclusion unambiguously applies only to traditionally recognized polluting activities. Home does not contend otherwise. It argues only that asbestos products might have been released in some case under all of the circumstances stated in the exclusions so as to make it applicable. As yet no claim has been denied by Home on the basis of the pollution exclusion so as to give rise to its actual application.

A motion for judgment on the pleadings cannot be granted. The facts are not sufficiently developed for the court

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7 CNA, whose policy is in excess of Continental's, claims it is entitled to the benefit of this exclusion but also contends that any application of the exclusion must await the rejection of a specific claim based on the exclusion.

to say that out of 18,000 claims, no claim will possibly fall within the exclusion even though it may appear extremely unlikely. Accordingly, UNR's motion for a declaratory judgment on the pleadings with respect to the pollution exclusion must be denied.

(8) Home's Claim Against UNR that the Mishandling of the Tibbet's Lawsuit and the Payment by Continental of $500,000 Did Not Exhaust Continental's 1976 Primary Coverage

Home claims against UNR that Continental's payment of $500,000 in primary insurance for the policy year 1976 was improvident and resulted from a mishandling of the claim by an attorney retained by Continental to represent UNR. Continental's payment was made as a result of an adverse judgment after trial. UNR has moved for judgment on the pleadings declaring that Continental's 1976 policy period primary coverage has been exhausted and for dismissal of Home's counterclaim against it for recovery of a sum paid to Tibbets by Home. Home states that, because UNR (and Home) point to documents outside the pleadings, UNR's motion is in reality for summary judgment and that it must be denied because there are material issues of fact to be resolved. The court agrees that the motion is one for summary judgment[8] but concludes those facts that are not in dispute dictate that Home has failed to state a cause of action against UNR which would warrant a finding that Continental has not exhausted its primary coverage for the 1976 policy period or constitute a valid counterclaim against UNR.

The undisputed facts are that on September 28, 1976, Richard Tibbets was injured in a Southern Pacific railroad accident in Multnomah County, Oregon. He sued his employer, Southern Pacific for $1,250,000, claiming that a brake was defective. Because UNR was responsible for the

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8 On October 11, 1988, this court entered an order pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, advising the parties that the matter would be considered as a motion for summary judgment and allowing time for further response if any was desired. On October 28, 1988, both sides filed additional documents.

manufacture of the brake, Southern Pacific tendered the defense of the case to UNR and sued UNR for indemnity. Continental accepted the tender for UNR.

Continental and Home were promptly notified of the Tibbets accident and of Southern Pacific's separate action for indemnification against UNR. Continental retained a trial attorney to represent UNR. Home chose not to participate in the defense of this case as it was entitled to do under its policy. After an adverse judgment in Tibbets in the amount of $648,364, Home acknowledged the exhaustion of Continental's primary insurance aggregate limit in 1976 of $500,000, and paid the excess judgment without any reservation of rights. Home now refuses any further payments to UNR under its policy for the 1976 policy period and seeks return of its payment in the Tibbets case on the theory that the case was negligently handled by the lawyer chosen by Continental.

Home has cited no policy language which would justify an action against UNR, nor has Home cited any applicable authority to support its position. Also, Home has brought no action against Continental.

The specific basis for Home's claim of negligence in the handling of the Tibbets case is: (1) that Continental should not have assumed the Tibbets defense because his claim was based on federal statutes applicable only to railroads; (2) an indemnity agreement given the railroad with the approval of Continental was improper in the light of its "active tortfeasor" status; and (3) defense and indemnity were improper because the Southern Pacific had notice of the brake problems. In a separate brief Continental has explained why each of these charges of possible mishandling is unfounded. It is not, however, necessary to reach these issues to decide that no claim made by Home precludes a finding that Continental has exhausted its 1976 period primary coverage.

Home had ample information about the matters of which it now complains. Under its policy, Home had the right and the opportunity to become associated in the defense of the Tibbets case at all times after November 1976. It deliberately chose not to become involved until after the adverse verdict in January of 1978. No policy provision, and no law, permits

Home to say nothing when the Tibbets claims were pending, then years later to attack its insured for the primary insurer's handling of those claims.

Home has cited no law which supports its theory that an excess insurer can proceed against its insured because of the primary insurer's alleged "improper exhaustion" of primary coverage or "negligent handling" of a defense. Authority does exist for an excess carrier to bring a bad faith action against a primary insurer for conduct in defense of a claim, either by stepping into the shoes of the insured through equitable subrogation, or through a direct action. *Valentine v. Aetna*, 564 F.2d 292 (9th Cir. 1977); *Portland General Electric v. Pacific Indemnity Co.*, 579 F.2d 514 (9th Cir, 1978) (Oregon law); *Valentine v. Liberty Mutual*, 620 F.2d 583 (6th Cir. 1980); 10 ALR 4th 879 "Excess carrier's right to maintain action against primary Carrier for wrongful failure to Settle claim against insured"; *Hartford Indemnity v. Michigan Mutual*, 462 N.Y.S. 2d 175 (1983), *aff'd*, 475 N.Y.S.2d 267 (1984) (direct right of action); and *Puritan Ins. Co. v. Canadian Universal Ins.*, 775 F.2d 76 (3rd Cir. 1985). Authority for an action by Home against Continental, however, is not equivalent precedent for Home's action against UNR.

Home relies on *Transit Casualty v. Srink Corp.*, 94 Cal. App. 3d 124, 156 Cal. Reptr. 360 (1979) and *Kaiser Foundation Hospitals v. North Star Reinsurance*, 90 Cal. App. 3d 786, 153 Cal. Reptr. 678 (1979). The *Transit* case, however, was expressly limited by the California Supreme Court in *Commercial Union Assurance v. Safeway Stores*, 26 Cal. 3d 912, 164 Cal. Reptr. 709 (1980).

The primary policy in *Transit*, unlike UNR's policy, included a clause permitting the insured to refuse consent to a settlement. The insured did so refuse. At the trial, the jury found both the primary carrier and the insured liable for wrongfully refusing to settle. The excess insurer attempted to proceed against the primary insurer through equitable subrogation, but was barred from recovery by the bad faith of the insured, its subrogee. Under these unique circumstances, the court did not limit the excess insurer to subrogation, and

instead found a three-way duty of care with regard to settlement negotiations.

In *Commercial Union*, *supra*, the court disapproved *Transit*'s "triangular reciprocity" and held that an insured does *not* have a duty to put an excess insurer's interests equal to its own in considering settlements. *Commercial Union*, *supra* at 921.

In *Kaiser Hospital*, *supra*, the excess insurer alleged that the insured acted in collusion with the primary insurer fraudulently to assign claims to policy years in a wrongful attempt to bring the excess insurance into play—an assertion that Home has not alleged against UNR. The case holds only that both the primary insurer and the insured owed a duty of good faith and fair dealing to the excess insurer, and allows, at most, a bad faith action by an excess insurer against an insured. Home has alleged no bad faith conduct by UNR.

The case of *Russo v. Rochford*, 472 N.Y.S. 2d 954 (1984), also cited by Home, is not on point. Home quotes language which is part of that court's broad review of all legal theories which might apply. Not only does the case not adopt "triangular reciprocity," but the facts do not even involve, as in the instant case, an action by an insurer against its insured.

Home refers to the attorney hired by Continental to represent UNR, as UNR's "agent." This is not a correct characterization. UNR had no right to control the defense. Accordingly, there was no agency relationship. *Morgan v. Kobrin Securities, Inc.*, 649 F. Supp. 1023, 1032 (N.D. Ill. 1986). Under the terms of UNR's primary insurance policy, Continental, not UNR, had "the right and duty to defend any suit. . . ." This feature of the Continental policy means that "the insurer has exclusive control over litigation against the insured, and the latter is required to surrender all control over the conduct of the defense." 8 J. Appleman 4681, *Nandorf, Inc. v. CNA Ins. Companies*, 134 Ill. App. 3d 134, 479 N.E.2d 988, 991 (1985). The fact that UNR may have concurred in or approved of Continental's action does not change the result.

Home has no cognizable claim against UNR which would authorize it to contend that UNR must refund any part of

Home's Tibbets payment even if it is not estopped to contest handling of the claim by Continental. Accordingly, as between UNR and Home, the underlying payment by Continental for the 1976 policy period has been exhausted and Home's counterclaim against UNR must be dismissed.

IT IS THEREFORE ORDERED as follows:

(1) Corroon & Black's motion to amend the court's previous opinion is granted, The fourth full paragraph under "(9) Other Refused Submissions" (682 F. Supp. 1456) is deleted and the following paragraph is substituted:

> During negotiations with UNR in 1976, Continental advised UNR that it did not believe it was insuring against asbestos claims in 1970 and 1973. It is undisputed that Continental did not charge a premium for asbestos risks in 1970 and 1973. Continental's underwriters were told by C&B only that UNR had gone out of the asbestos business. It was not told that UNR had been sued in 1968 and in 1969 in the *Tomplait*, *Parker*, and *Borel* cases or that UNR and its lawyers anticipated that additional asbestos claims would be made (Tr. 6072-73, PC 13B). Arguably, when UNR obtained coverage from Continental in 1970 it should have given immediate notice of "accidents," but it did not do so. Further, Gainer of C&B, stated that C&B, as UNR's broker, had been less than candid with Continental in connection with the 1973 renewal of Continental's coverage.

(2) The issue of costs based on the declaratory relief granted is reserved until the entire case is concluded.

(3) Continental's motion for summary declaratory judgment with respect to relief relating to a 1974 amendatory endorsement of its 1973 policy No. CBP 407271 issued to UNR is granted.

(4) Continental's motion for summary declaratory judgment that it has no liability for claims filed against UNR after December 31, 1981 is denied.

(5) National Surety's and Fireman's Fund's motion to dismiss is granted and the Clerk of the Court will enter judgment on the merits dismissing UNR's claims against those defendants with prejudice and with costs. UNR's motion for summary judgment against those defendants on the issue of contractual liability insurance coverage, is accordingly, denied.

(6) The Clerk of the Court will enter summary declaratory judgment with respect to the effect of the Houston Agreements on the coverage provided by the excess and umbrella carriers.

(7) UNR's motion for summary declaratory judgment with respect to the asbestosis exclusion is granted and will be entered by the Clerk of the Court.

(8) UNR's motion for judgment on the pleadings with respect to the pollution control exclusion is denied.

(9) UNR's motion for summary declaratory judgment with respect to the Tibbets case is granted and the Clerk of the Court will enter a summary declaratory judgment in favor of UNR finding that Continental has exhausted its primary coverage for the 1976 annual period and judgment will be entered against Home Insurance Company dismissing Count III of Home's counterclaim against UNR.

(10) This court finds and concludes in accordance with the standards previously set forth in the opinion filed February 25, 1988 that the issues resolved herein are sufficiently separate that a reviewing court may deal with them confident that the same problems will not recur on a later appeal of the same case. Therefore pursuant to Rule 54(b) of the Federal Rules of Civil Procedure this court determines that there is no just reason for delay and directs that judgments be entered which shall become immediately appealable.

ENTER:

/s/ William T. Hart

UNITED STATES DISTRICT JUDGE

Dated: November 8, 1988

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 85 C 3532

UNR INDUSTRIES, INC., *et al.*,

Plaintiffs,

—v.—

CONTINENTAL INSURANCE COMPANY, *et al.*,

Defendants.

ORDER

This matter is before the court on the various motions of plaintiff UNR Industries, Inc. ("UNR") and the defendants to reconsider or amend the opinion and the declaratory judgment both dated November 8, 1988, for a determination of appealability of the judgment and for consideration of the matters remaining to be determined in Phase III of this case.

I. *The Motions to Amend*

1. The motion of UNR to amend the declaratory judgment with respect to the liability of insurance carriers during the so-called "exposure in residence" period is denied.

2. The motion of UNR to amend the declaratory judgment with respect to insurance coverage during "fractional aggregate periods" is denied.

3. The motion of UNR to amend the November 8, 1988 opinion to restate the periods and coverage of The Home Insurance company is granted. Page 21 of the opinion is hereby amended to reflect four periods of coverage as fol-

lows: November 1, 1973 to November 1, 1974 with an aggregate of $7.5 million; November 1, 1974 to November 1, 1975 with an aggregate of $7.5 million; November 1, 1975 to November 1, 1976, with an aggregate of $7.5 million; and November 1, 1976 to December 31, 1976 with an aggregate of $2 million.[9]

4. The motion of Northbrook Excess and Surplus Insurance Company ("Northbrook") to amend paragraph II(1) of the declaratory judgment dated November 8, 1988 to state that Continental's underlying primary coverage for the calendar years 1977 was $1 million instead of $500,000 is granted and the judgment is hereby amended.

5. The motion of UNR to amend page 13 of the opinion dated November 8, 1988 to describe the Continental deductibles as "per occurrence" deductibles instead of "per claim" deductibles is granted. Accordingly, the sentence on page 13 of the opinion is amended to read as follows:

> "To the extent that Continental is required to cover UNR for any post-December 31, 1981 asbestos bodily injury claims, however, its obligation for defense or indemnity is subject to the satisfactory resolution of UNR's obligation to fund any policy per occurrence deductibles in Continental's 1976, 1977, 1978 and 1979 policies."

6. Continental's post-judgment argument concerning the interpretation of its 1977, 1978, and 1979 per occurrence deductibles is not properly before the court on a Rule 59 motion and will not be considered.

7. Continental's motion to amend the November 8, 1988 declaratory judgment to state that it has no obligation under its 1970-1979 policies to respond to post-December 31, 1981 asbestos claims against UNR is denied.

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9 An issue with respect to the amount of, and dates of, a buffer layer assumed by UNR remains to be resolved.

8. Continental has moved, alternatively, to amend the November 8, 1988 declaratory judgment to state that any obligation it has to respond to claims against UNR reported after December 31, 1981 is subject to an obligation on the part of UNR to fund claims handling expense.

UNR's obligation to pay claims handling charges and expenses incurred by Continental was defined in Houston Agreements and in specific service contracts with Continental's claims handling branch, Underwritings Adjusting Company ("UAC"). The Houston Agreements have expired and a mutual release was entered into by the parties with respect to the UAC services contracts. The language of the Continental policies govern the issue of claims handling expense after the expiration of the foregoing agreements. Under these policies Continental is required to pay "all expenses incurred by the company." (These expenses are not the same as the expense included in the policy deductibles which are defined as "attorneys' fees, premiums or bonds paid for by the company in accordance with the policy provisions, interest accruing after the entry of judgment against the insured, allocated loss adjustment expenses and expenses in securing recovery against a third party.") Continental is not entitled to a declaratory judgment stating that UNR must pay claims handling expenses for asbestos claims filed after December 31, 1981.

9. Northbrook and First State Insurance Company ("First State") move to amend the summary declaratory judgment limiting the asbestosis exclusion to claims based on the disease asbestosis. The argument was originally made by both the insurance companies and UNR that the term "asbestosis" was clear on its face. The court concluded that "asbestosis" had a precise dictionary and medical definition which was clear and should be followed. On reconsideration the insurance companies point to many instances in which medical, legal experts, and other insurance companies (Continental in this case) have used the term asbestosis to mean "asbestos-related" even though it can be shown to be incorrect from a technical point of view. The argument made is that both the

insurance companies and UNR always understood asbestosis to include all asbestos-related claims and have acted accordingly. It was pointed out that UNR's conduct in tendering claims has been consistent with the position that the term "asbestosis" includes all asbestos-related claims.

There is legal support for the proposition that if both parties intended a particular construction to govern their conduct that their mutual intent should control over any imprecision in the language of their contract. *Western Transportation Co. v. Wilson and Company, Inc.*, 682 F.2d 1227, 1231 (7th Cir. 1982); *White v. Roughton*, 689 F.2d 118, 120 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983); *Sunstream Jet Exp. v. International Air Service Co.*, 734 F.2d 1258, 1268 (7th Cir. 1984); *Carey-Canada, Inc. v. California Union Insurance Company, et al.*, No. 83-1105, slip op. 3-10 (D.D.C. May 7, 1985). Viewed in this light, sufficient evidence has been advanced by the insurance companies to preclude the court from granting summary judgment in UNR's favor on this issue. Accordingly, paragraph III of the declaratory judgment dated November 8, 1988 is hereby vacated and this issue will be among those tried in Phase III of this case.

10. The Home Insurance Company ("Home") and Zurich Insurance Company ("Zurich") have moved to amend paragraph II(6) of the declaratory judgment dated November 8, 1988 to state that if insurance coverage for an asbestos bodily injury claim is provided by more than one primary insurance carrier UNR must exhaust its rights against all primary carriers before calling upon any excess insurance carrier to assume liability for such claim. The insurance companies state that this is the intent of Illinois law as stated in *Illinois Emcasco Ins. Co. v. Continental Casualty Co.*, 83 Ill. Dec. 666, 487 N.E.2d 110 (1st Dist. 1985) and that this decision is not in conflict with the decision of the Court of Appeals in *Home Insurance Company v. Certain Underwriters of Lloyds, London*, 729 F.2d 1132 (7th Cir. 1984). This interpretation is correct and the declaratory judgment is hereby amended to state as follows:

(7) In any instance in which more than one primary carrier is obligated to respond to a single claim, UNR may not look to excess and umbrella carriers for coverage and indemnity until all primary carriers have exhausted the underlying limits of primary coverage.

II. *Appealability*

This court agrees with the view advanced by UNR that under the decision of the Court of Appeals in *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 860 F.2d 1441 (7th Cir. 1988), this is not a case in which the court may make its decisions final and appealable under Rule 54(b) of the Federal Rules of Civil Procedure. There remains for trial claims against the defendants which may permit the introduction of some evidence considered in connection with the claims previously tried. Furthermore, no losing party has requested the court to certify any issues for appeal under Title 28, United States Code, § 1292(b). Accordingly, the next order of business in this case will be to proceed to dispose of the remaining claims in Phase III.

III. *Disposition of the Remaining Issues*

By previous opinions in this case dated November 30, 1984, 607 F. Supp. 855 (N.D. Ill. 1984), April 9, 1985, 623 F. Supp. 1319 (N.D. Ill. 1985) and October 7, 1985, rulings were made with respect to pleadings filed by UNR including its second amended complaint. On November 6, 1985, UNR sought leave to file a proposed Third Amended Complaint. Objections to the filing of the proposed complaint became fully briefed at the time discovery was halted and preparations were begun for the trial of Phase I issues. Rather than rule again on legal objections, discovery will proceed to a conclusion on the presently filed pleadings and the merits of the objections to the Third Amended Complaint will be considered after any remaining discovery is completed. At that time, the court will consider all remaining legal objections

and motions for summary judgment if any are filed. In this way the parties' positions may be updated by reference to any relevant findings and evidence contained in the Phase I trial record and final limited discovery.

V. *Discovery*

There shall be no additional written discovery. On January 20, 1989 at 1:30 p.m. the parties may present either a joint agreed deposition schedule for remaining discovery or individual presentations, if agreement cannot be achieved. No person who has been previously deposed or who testified at the Phase I trial may be recalled for a deposition without leave of court. Discovery must be completed by March 30, 1989. Motions, if any, for summary judgment with Rule 12 statements and supporting briefs not to exceed 15 pages must be filed on or before April 30, 1989.

IT IS FURTHER ORDERED as follows:

(1) The motions to amend the opinion and declaratory judgment both dated November 8, 1988 are granted in part and denied in part as stated in this Order.

(2) This matter is set for status on the final discovery phase of this case on January 20, 1980 at 1:30 p.m.

ENTER:

/s/ William T. Hart
UNITED STATES DISTRICT JUDGE

Dated: January 10, 1989

NUMBER OF COMPLAINANTS FILING LAW SUITS TO DATE

YEAR	NUMBER OF COMPLAINANTS
1966	1
1967	0
1968	1
1969	2
1970	0
1971	1
1972	5
1973	9
1974	21
1975	57
1976	145
1977	352
1978	768
1979	1,680
1980	4,212

Supp. Rec. Vol. 13
No. 68, Exh. 7

UNARCO INDUSTRIES, INC.
ASBESTOS PRODUCT SALES 1936-1970

YEAR	TOTAL
1970	$ 190,000 Est.
1969	608,652
1968	517,863
1967	689,759
1966	741,990
1965	672,104
1964	966,011
1963	1,813,585
1962	2,729,545
1961	3,766,540
1960	4,006,116
1959	4,375,080
1958	3,628,295
1957	4,260,417
1956	4,280,607
1955	4,156,550
1954	4,733,212
1953	7,000,000 Est.
1952	7,748,000 Est.
1951	7,590,059
1950	5,220,341
1949	5,670,000 Est.
1948	7,825,000 Est.
1947	5,800,000 Est.
1946	4,000,000 Est.

UNARCO INDUSTRIES, INC.
ASBESTOS PRODUCT SALES 1936-1970

YEAR	TOTAL
1945	6,100,000 Est.
1944	8,043,649
1943	8,531,247
1942	5,335,910
1941	3,230,082
1940	1,589,976
1939	1,316,873
1938	944,673
1937	1,756,303
1936	1,464,446

Source

1955-1969 - Company Financial Statements
1950-51 and 54 - Auditors Report
1936-1944 - Prospectus Filed in 1946
Estimates - Percentage of Total Sales

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE

UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., and FOLDING CARRIER CORP., Debtors.	In Proceedings for a Reorganization Under Chapter 11 of the Bankruptcy Code Nos. 82 B 9841-9845, 82 B 9847 82 B 9849 and 82 B 9851 Judge David H. Coar

CONFIRMATION ORDER

The Plan Of Reorganization Dated March 14, 1989 (the "Plan") under Chapter 11 of the Bankruptcy Code having been filed herein on March 15, 1989 by UNR Industries, Inc., Unarco Industries, Inc., UNR, Inc., UNR-ROHN, Inc. (Alabama), UNR-ROHN, Inc. (Indiana), Jobal Tube Co., Inc., UNR Products, Inc., and Folding Carrier Corp. (hereinafter referred to collectively as the "Debtors"); and the Disclosure Statement with respect to the Plan having been approved as containing adequate information pursuant to an order dated March 22, 1989; the Court having conducted an evidentiary hearing on confirmation of the Plan upon notice to creditors and other parties in interest; the Court having heard the testimony of the Debtors' witnesses and considered all other evidence adduced by the Debtors in support of the Plan; the Court having considered the statements of counsel for the Debtors, the Official Unsecured Creditors' Committee, the Official Committee of Asbestos-Related Plaintiffs, the Legal Representative for Unknown Putative Asbestos-Related Claimants and the Examiner in support of the Plan; Capitalized terms used in this order shall have the meanings attributed to them in the Plan, a copy of which is attached and made a part of this order.

NOW, THEREFORE, THE COURT FINDS AS FOLLOWS:

1. The Plan has been accepted in writing by the creditors

and equity security holders whose acceptance is required by law.

2. The Plan complies and the Debtors, its proponents, have complied with the provisions of Chapter 11 of the Code.

3. The Plan has been proposed in good faith and not by any means forbidden by law.

4. Each holder of a claim or interest will receive or retain under the Plan property of a value, as of the Effective Date of the Plan, that is not less than the amount that such holder would receive or retain if the Debtors were liquidated under Chapter 7 of the Code on such date.

5. All payments made or promised by the Debtors, or by any other person issuing securities or acquiring property under the Plan, or by any other person for services or for costs and expenses in or in connection with the Plan and incident to the case, have been fully disclosed to the Court and are reasonable or, if to be fixed after confirmation of the Plan, will be subject to the approval of the Court.

6. The identify, qualifications, and affiliations of the persons who are to be directors, officers, or voting trustees of the Debtors after confirmation of the Plan have been fully disclosed and the appointment of such persons to, or their continuance in, their respective offices, is consistent with the interests of the creditors and equity security holders and with public policy.

7. Upon the Effective Date of the Plan, the Board of Directors of New UNR shall consist of the following individuals, who shall serve until their successors shall have been selected and such successors shall have qualified: John F. Foran, R.J.J. Hiemstra, Jr., William S. Leavitt, Dwight Rohn and Basil Vasiliou.

8. The identify of any insider that will be employed or retained by the Debtors after confirmation of the Plan, and the nature of such persons' compensation, have been fully disclosed.

9. Confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtors or any successor to the Debtors under the Plan.

10. All of the conditions precedent to confirmation of the Plan prescribed in Article IV Paragraph E of the Plan have been satisfied.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Plan of Reorganization Dated March 14, 1989 filed by the Debtors on March 15, 1989, a copy of which Plan is attached hereto, be and is hereby confirmed;

2. Any officer of a Debtor or New UNR be and is hereby authorized to take any and all actions necessary to effectuate the Plan, including, without limitation, amending the charter of any one or more of the Debtor companies in which such individual holds office.

Dated: June 1, 1989

ENTER:

/s/ David H. Coar
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE

UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC. UNR, INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., and FOLDING CARRIER CORP.,

In Proceedings for a Reorganization Under Chapter 11 of the Bankruptcy Code

Nos. 82 B 9841-9845,
82 B 9847
82 B 9849 and
82 B 9851

Judge David H. Coar

ORDER APPROVING DISCLOSURE STATEMENT AND FIXING TIME FOR FILING ACCEPTANCES OR REJECTIONS OF PLAN, COMBINED WITH NOTICE THEREOF

DISCLOSURE STATEMENT
Dated March 14, 1989

PLAN OF REORGANIZATION
Dated March 14, 1989

and

RELATED DOCUMENTS

(EXCERPTS)

DISCLOSURE STATEMENT PURSUANT TO §1125 OF THE BANKRUPTCY CODE

A. INTRODUCTION

* * *

THE BOARD OF DIRECTORS OF UNR INDUSTRIES, INC. HAS APPROVED THE PLAN. THE PLAN IS SUPPORTED BY THE UNSECURED CREDITORS' COMMITTEE. THE LEGAL REPRESENTATIVE HAS ADVISED THE COURT THAT UNDER THE CIRCUMSTANCES HERE PRESENTED, THE PLAN MAKES ADEQUATE PROVISIONS FOR FUTURE CLAIMANTS.

* * *

[T]he proposed Plan described herein is designed, within the limits of the resources available:

To liquidate UNR's asbestos-related claims against insurance carriers and the United States government (page 1).

C. UNR'S CHAPTER 11 REORGANIZATION

1. Background

Asbestos is a naturally occurring fibrous mineral with many unique properties which historically has made it especially useful as a fireproofing material, a reinforcement fiber, a thermal insulation, a friction material and a strategic material for defense purposes. Inhalation of certain types of asbestos fibers, however, presents occupational disease risks; these diseases or conditions do not become manifest in most situations until many years after initial exposure. From 1918 until 1970, Union Asbestos and Rubber Company and Unarco Industries, Inc., predecessor companies to some of the Debtor corporations, manufactured asbestos insulating cements, pipe coverings, flexible insulations, packing gaskets and other fibrous materials. These products were utilized primarily in high temperature applications, especially as pipe coverings in warships during World War II and the Korean War, in chemical plants, in oil refineries, power plants and in boiler rooms. In 1962, Unarco discontinued the production of substantially all of its asbestos products. The remaining limited special product line was discontinued in 1970.

Beginning in the early 1970's, predecessors of UNR and other asbestos manufacturers were sued by individuals claiming damages, based upon a variety of legal theories, for bodily injury arising from exposure to asbestos products manufactured by the predecessors of UNR (page 3).

* * *

2. Appointment Of Committees, Legal Representative, Examiners and Other Legal Proceedings (page 4)

* * *

e. *The Insurance Litigation*

(1). *Origin of Litigation*

UNR is engaged in litigation with ten of its liability insurance carriers, and its former insurance broker, regarding coverage for asbestos-related claims. This litigation began in 1981 when Commercial Union Insurance Company, an excess insurer commenced an action against Unarco Industries, Inc., a predecessor of UNR, in the Illinois State Court . . .

* * *

(2). *Bankruptcy Proceedings*

When UNR filed its petition for reorganization in July of 1982, the litigation with the insurers was stayed by the state court. To resolve the question of its insurance coverage, and to require its insurers to resume payments for asbestos-related claims, UNR commenced an action in 1983 in the U.S. Bankruptcy court. (*UNR Industries, Inc. v. Continental Insurance Company, et al.*, No. 85 C 3532, formerly 83 A 2523.) This action included claims by UNR for declaratory relief, breach of contract, bad faith, breach of fiduciary duty, negligence, antitrust violations and other related claims. UNR's lawsuit, together with claims and counterclaims filed by UNR's insurers, was transferred in late 1983 to Judge William T. Hart in the U.S. District Court for the Northern District of Illinois. Judge Hart dismissed UNR's claims for antitrust violations but ordered the insurers to answer UNR's remaining claims.

* * *

(4). *Phase I Trial*

In early 1987 a portion of UNR's claims against its primary insurers was tried in the U.S. District Court for the Northern District of Illinois. Some claims involved factual issues and were tried before a jury; other claims involved legal issues and were decided by Judge Hart. The outcome of the Phase I trial included the following:

(a) For asbestos-related claims filed before January 1, 1982, the primary insurers successfully argued that their obligations were limited by an informal agreement with UNR. The effect of this informal agreement was to reduce the insurers' defense and indemnity obligations to between 50% and 74% of the defense and indemnity costs of asbestos-related claims. Judge Hart also ruled that one of the primary insurers, Bituminous Casualty Corporation ("Bituminous"), had paid the full amount of its indemnity limits for asbestos-related bodily injury claims. Following the Phase I trial, the primary insurers have since paid UNR approximately $6.6 million representing a portion of the amounts owed for cases filed before 1982.

(b) For asbestos-related claims filed after January 1, 1982, UNR was successful in arguing that the primary insurers were required to pay 100% of the defense and indemnity costs, subject to the policy limits, for asbestos-related claims which fell within their policies. Furthermore, UNR's excess insurers, who issued an additional $60 million in potential coverage to UNR, are likewise required to pay 100% of asbestos-related claims which fall within their policies. These rulings are based on the Illinois Supreme Court's decision in *Zurich v. Raymark*, 118 Ill.2d 23, 514 N.E.2d 150 (1987).

(c) Only a portion of UNR's claims against its primary insurers was tried in Phase I. UNR's remaining claims for bad faith, breach of contract, and breach of fiduciary duty were not tried. Nor (sic) was UNR's claim for negligence against its former insurance broker. UNR is presently engaged in settlement discussions with its primary insurers and former broker regarding these claims. Unless these claims are settled, UNR intends to pursue these claims to a final conclusion,

including any appeals that may become necessary. As of the date of this Disclosure Statement, the time for appeal has not yet expired.

(d) Judge Hart also ruled that UNR did not possess insurance coverage for asbestos-related bodily injury claims until June, 1958.

(5). *Phase II Rulings*

In November, 1988, Judge Hart entered further rulings relating to UNR's excess insurance coverage. Although additional rulings will be required before the full extent of UNR's excess coverage is decided, the effect of the Phase II rulings was to eliminate many of the excess insurer defenses. Other defenses, such as the "asbestosis" exclusion, will be tried as part of Phase III. As with the primary insurers, UNR is engaged in discussions with its excess insurers regarding a settlement of the remaining issues. If these settlement discussions are not successful, UNR intends to litigate its claims against the excess insurers to a final conclusion (page 6).

* * *

(7). *Phase III Trial*

The remaining issues in the bodily injury insurance litigation, including claims for bad faith, breach of contract and negligence will be tried as Phase III. Judge Hart has established a cut-off date of March 30, 1989, for discovery on Phase III issues. Motions for summary judgment must be filed no later than April 30, 1989. UNR will request a trial date as soon as practicable following the rulings on any summary judgment motions. The parties involved in the Phase III trial include the primary and excess insurers and UNR's former insurance broker (page 7).

* * *

E. PLAN OF REORGANIZATION

* * *

1. Overview of Plan

The Debtors believe that considering all of the facts and circumstances, the Plan described in this Disclosure Statement provides equitable recoveries to all creditors, asbestos-disease claimants. Future (sic) Claimants and asbestos-property damage claimants while at the same time preserving value for existing stockholders. The Plan provides for conversion of substantially all of the Debtors' pre-petition liabilities into equity in the reorganized corporation.

The plan calls for 42,404,847 shares of the common stock of reorganized UNR, 92% of the common stock of New UNR or the proceeds of the sale thereof, to be distributed to or for the benefit of unsecured creditors and Asbestos-Disease Claimants. Existing shareholders will retain 3,687,378 shares, 8% of the stock of New UNR. Existing stockholders will also receive one warrant for each such share. Each warrant will entitle the holder to purchase an additional share at $5.15 per share.

The Plan contemplates that Debtors may continue to prosecute those asbestos-related claims it has already asserted against other parties, including the United States government and the Debtors' insurers. All recoveries on such claims will be retained by New UNR, thereby potentially enhancing the value of New UNR stock distributed pursuant to the Plan.

* * *

a. *Asbestos-Disease Claims*

The Plan establishes Class 5, which consists of Asbestos-Disease Claims and related indemnity and contribution claims. The Plan defines "Asbestos-Disease Claims" as follows:

> All alleged liabilities or obligations (under any theory of law, equity or admiralty) for death, personal injury, personal damages or punitive damages (whether physical, emotional or otherwise), whether or not included in the definition of

> "claim" in §101(4) of the Code, arising out of exposure to asbestos, and arising from acts or omissions by one or more of the Debtors or the Debtors' predecessors in interest prior to the Effective Date regardless of when the sickness, injury or disease which gives rise to such liability or obligation, becomes or will become manifest, including, without limitation, all warranty, guarantee, indemnification or contribution liabilities or obligations of any of the Debtors to any other Entity to the extent that such warranties, guarantees, indemnifications or contribution responsibilities to such Entity cover claims against such Entity that would, if such claims had been made directly against any of the Debtors, constitute Asbestos-Disease Claims (page 10).

Under the Plan, upon the Effective Date, the assets of each of the Debtors estates will revest in the respective Debtors free and clear of Asbestos-Disease Claims. Entities holding such claims will be prevented from asserting them against the Debtors and New UNR because of the injunction described below.

Under the Plan, Asbestos-Disease Claims shall be fully settled and satisfied by distribution of common stock of New UNR, or the proceeds of the sale thereof, to Trustees of a UNR Asbestos-Disease Claims Trust for the benefit of all holders of Asbestos-Disease Claims. The number of shares of such stock to be distributed to those Trustees will be determined by deducting the shares to be distributed to Class 4 claimants under the Plan from 42,404,847 shares, representing 92% of the shares of New UNR. All of the costs and expenses of distribution and allowance of Asbestos-Disease Claims shall be paid by such Trust from its share of Creditor Stock.

The precise number of shares available to such Trust for the benefit of Class 5 claimants will not be known until the aggregate allowed amount of all Class 4 claims has been determined. However, approximately 29,440,000 shares, approximately 53% of the shares of New UNR would have been available for Class 5 if there were no Asbestos-Property Claims allowed.

It is impossible to predict with any certainty the number, liquidated value or time of assertion of Asbestos-Disease Claims.

The best information available in that area is the Towers Perrin Actuarial Study referred to above, together with the fact that as of February 21, 1989, approximately 105,000 Asbestos-Disease Claimants were known to be asserting claims against the Debtors. Those claims have a face amount in excess of $38 billion, which amount does not include the substantial number of such claims which were filed as "unliquidated".

The Plan provides:

> The methods of distribution and allowance of Asbestos-Disease Claims shall be determined by agreement between the Plaintiffs' Committee and the Legal Representative subject to Court approval, after Notice and a Hearing. Punitive damages shall not be allowable. In the event that the Plaintiffs' Committee and Legal Representative cannot so agree within 90 days after the Effective Date, or such further time as the Court may grant for cause shown, or in the event that the Court shall not approve any such agreement, the Court, after Notice and a Hearing, shall determine such methods.

Professor Francis E. McGovern of the University of Alabama Law School has been appointed by the Court, upon the application of the Plaintiffs' Committee, as expert and advisor for the purpose of assisting the parties in interest to develop a method for processing and liquidating the claims of persons who have been or will be damaged as a result of exposure to asbestos-containing products. Professor McGovern has drafted Claims Resolution Procedures, a copy of which is attached.

The Plaintiffs' Committee and the Legal Representative have drafted and approved a proposed UNR Asbestos-Disease Claims Trust, including Annex A thereto, proposed UNR Asbestos-Disease Claims Trust By-Laws, and Annex B thereto, proposed UNR Asbestos-Disease Claims Resolution Procedures, copies of which are also attached. The proposed UNR Asbestos-Disease Claims Resolution Procedures attached to the proposed UNR Asbestos-Disease Claims Trust as Annex B thereto is substantially the same as the Claims Resolution Procedures drafted by Professor McGovern. THESE DOCUMENTS HAVE NOT YET BEEN SUBMITTED TO THE COURT FOR APPROVAL.

b. *Unsecured Trade Claims and Other Unsecured Claims*

The Plan establishes Class 4, which consists of Unsecured Trade Claims and Other Unsecured Claims. Asbestos-Property Claims are included within Class 4. Class 4 is impaired under the Plan.

As explained above, the formula for the settlement of Class 4 claims is the result of intense and protracted negotiations among the Unsecured Creditors' Committee, the Plaintiffs' Committee and the Legal Representative. At issue was the aggregate dollar amount to be attributed to all of the Asbestos-Disease Claims. The claims of the constituency of the Plaintiffs Committee and the Legal Representative are unliquidated. In contrast, the claims of the constituency of the Unsecured Creditors Committee were liquidated and totalled approximately $112 million. Using the median of the Towers Perrin Actuarial Study's range of value for the total existing and future cost of asbestos-related disease claims, and reducing it to present value, the negotiators settled on an aggregate Asbestos-Disease Claims amount for negotiating purposes. This number was approximately 2.27 times greater than the liquidated amount of the Class 4 Claims. Consequently, the negotiators agreed to divide whatever recovery they ultimately received under the Plan on a 2.27 to 1 basis. As creditors will receive in total 92% of the stock of New UNR, the amount allocated to Asbestos-Disease Claims is 63%, reduced by a share of the Asbestos-Property Damage claims also calculated on the 2.27 to 1 basis (page 11).

* * *

7. Legal Effects of the Plan

a. *Discharge of Claims and Vesting of Assets Free and Clear*

Except as otherwise provided in the Plan or in the order of confirmation, confirmation of the Plan will act as a discharge effective as of confirmation, of all claims against each of the Debtors that arose at any time before confirmation. Pursuant to the Code, the discharge of the Debtors will be effective as to each claim, regardless of whether a proof of claim therefore was filed, whether the claim is an allowed. claim, or whether the holder thereof votes to accept the Plan. As provided in the Code, however, the discharge of such claims will not affect the

liability of any entity other than the Debtors, or the property of any entity other than the Debtors.

* * *

c. *Conditions Precedent to Confirmation of the Plan*

In addition to obtaining the injunction and an order granting the Debtors' motion for substantive consolidation, it is a condition precedent to Confirmation of the Plan that the Court shall have entered an order decreeing or adjudging in substance that all proceeds of the Insurance Litigation, whether generated or to be generated by reason of litigation or by reason of settlement, constitute Property of the Estate of the Debtors and that such proceeds shall, prior to the Effective Date be paid to the Debtors, and after the Effective Date to New UNR, be free and clear of the claims of all Entitles, including without limitation, Creditors and the holders of Asbestos-Disease Claims and Asbestos-Property Claims.

The "Insurance Litigation" is defined by the Plan as:

> All claims and litigation heretofore, now or hereafter asserted or commenced by or against any of the Debtors or New UNR or any of its affiliates, for the purpose of asserting, enforcing or adjudicating any rights of the Debtors, the predecessors or successors of any of them, the holders of Asbestos-Disease Claims or the holders of Asbestos-Property Claims, against any insurance carrier or broker relating in any way whatsoever to insurance coverage, or the lack thereof, of the Debtors or their predecessors and in any way to damage resulting from asbestos.

As discussed above ("The Insurance Litigation") UNR and certain of its affiliates have for many years been pursuing litigation against insurance companies which had issued policies to UNR and its predecessors to require them to indemnify UNR against losses resulting from asbestos-related claims and to assume the costs of defending UNR against such claims. The Plan contemplates that the fruits of such litigation will be ultimately paid to New UNR, thereby benefitting all parties in interest (page 14).

8. Best Interests of Creditors and Shareholders (page 15)

* * *

b. *Insurance and Other Claims*

As hereinabove set forth, Debtors are prosecuting substantial litigation against their insurance carriers and their former insurance broker regarding coverage for asbestos-related claims and against the Federal Government for indemnification and contribution with respect to asbestos-related claims.

* * *

Under the Plan, the proceeds of insurance litigation will be the property of New UNR, free and clear of the claims of all other Entities. As set forth in the Plan, the Asbestos-Disease Claimants claim that such proceeds are not Property of the Estate. Existing shareholders, the Debtors and the general unsecured creditors disagree. Accordingly, in Chapter 7, litigation over that issue would almost certainly develop. The cost to the trustee, the creditors and shareholders of such litigation would be great. Anything spent on that dispute would diminish the net proceeds of insurance litigation available to all parties in interest (page 16).

* * *

10. Federal Income Tax Consequences (page 17)

* * *

a. *Tax Consequences to Debtor*

* * *

(2). *Transfer of Creditor Stock to Trustees*

Generally, a corporation is allowed a deduction for a payment in satisfaction of a tort liability claim at that point in time when the payment is made to the tort claimant. The Tax Reform Act of 1986 added Tax Code Section 468B which provides that for tax deduction purposes, the transfer by a corporation of its stock to a trust in settlement of a class of tort claims made against the corporation is not treated as a payment to the tort claimants. Thus, the Debtor will not be allowed a deduction at the time

of the issuance of Creditor Stock in trust in satisfaction of tort claims (page 18).

* * *

F. CONCLUSION

* * *

2. Recommendation

DEBTORS BELIEVE THAT CONFIRMATION OF THE PLAN IS DESIRABLE AND IN THE BEST INTERESTS OF CREDITORS AND INTEREST HOLDERS. The Plan provides for an equitable distribution to all Classes of creditors and preserves value for equity security holders. Any alternative to confirmation of the Plan, such as liquidation or attempts by another party in interest to file a Plan, would result in significant delays, litigation and cost. Debtors believe that a Plan filed by another party in interest could only be confirmed over the objection of one or more impaired Classes and would generate costly and time-consuming litigation. Moreover, as described above (Best Interests Of Creditors and Shareholders), Debtors believe that its creditors will receive greater and earlier recoveries under the Plan than those which could be achieved in liquidation. FOR THESE REASONS, DEBTORS URGE YOU TO RETURN YOUR BALLOT ACCEPTING THE PLAN.

UNR, INDUSTRIES, INC.,

By: /s/ Robert J. Penn
ROBERT J. PENN
President and Chief Executive Officer

By: /s/ Malcolm M. Gaynor
One of its attorneys

MALCOLM M. GAYNOR
RICHARD M. BENDIX, JR.
SCHWARTZ, COOPER, KOLB & GAYNOR CHARTERED
20 South Clark Street
Suite 1100
Chicago, Illinois 60603

ROBERT N. GRANT
THOMAS LINDEN
SONNENSCHEIN CARLIN NATH & ROSENTHAL
8000 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606 (page 22)

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE

UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC. UNR, INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana),) JOBAL TUBE CO., INC., UNR PRODUCTS, INC., and FOLDING CARRIER CORP., Debtors.	In Proceedings for a Reorganization Under Chapter 11 of the Bankruptcy Code Nos. 82 B 9841-9845, 82 B 9847 82 B 9849 and 82 B 9851 Judge David H. Coar

CONSOLIDATED PLAN OF REORGANIZATION
DATED MARCH 14, 1989

UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC., (Alabama), UNR-ROHN, INC., (Indiana), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., and FOLDING CARRIER CORP., debtors and debtors- in-possession (the "Debtors"), propose the following Consolidated Plan of Reorganization:

DEFINITIONS (page 23)

* * *

Insurance Litigation: All claims and litigation heretofore, now or hereafter asserted or commenced by or against any of the Debtors or New UNR or any of its affiliates, for the purpose of asserting, enforcing or adjudicating any rights of the Debtors, the predecessors or successors of any of them, the holders of Asbestos-Disease Claims or the holders of Asbestos-Property Claims, against any insurance carrier or broker relating in any way whatsoever to insurance coverage, or the lack thereof, of the Debtors or their predecessors and in any way to damage resulting

from asbestos (page 24).

* * *

ARTICLE IV

MEANS FOR EXECUTION OF THE PLAN (page 25)

* * *

C. New UNR and its Affiliates shall be entitled to pursue the Insurance Litigation subsequent to the Effective Date and to recover the proceeds thereof. Nothing contained in this Plan shall in any way adversely affect or diminish the Debtors' rights in the Insurance Litigation, nor benefit or release the insurance carriers from the full amount of their liability, nor shall the settlement or satisfaction of claims against the Debtors provided for in this Plan in any way relieve the insurance carriers from any liability, including but not limited to defense and indemnification obligations.

* * *

E. On or before the Effective Date, as a condition precedent to the Confirmation Order, the Court shall have entered orders granting, decreeing or adjudging in substance the following:

1. That all proceeds of the Insurance Litigation, whether generated or to be generated by reason of litigation or by reason of settlement, constitute Property of the Estate of the Debtor and that such proceeds shall, prior to the Effective Date be paid to the Debtor and after the Effective Date to New UNR, free and clear of the claims of all Entities, including without limitation, Creditors and the holders of Asbestos-Disease Claims and Asbestos- Property Claims. Substantial unresolved legal issues exist regarding whether the proceeds of the Insurance Litigation constitute Property of the Estate. The Asbestos-Disease Claimants claim that such proceeds are not Property of the Estate. The existing shareholders, the Debtors, and the general unsecured creditors claim that such proceeds are Property of the Estate. The parties have not litigated this issue, and wish to resolve this issue without litigation. For purposes of the Plan, and the Plan alone, all proceeds of the Insurance Litigation, whether generated by reason of litigation

or settlement, shall be treated as Property of the Estate of the Debtors; provided, however, that this shall not constitute a determination that, as a matter of law, the insurance proceeds would otherwise be treated as Property of the Estate, and may not be cited as legal authority to that effect, in any case which does not, directly or indirectly, involve the Debtor or any of their affiliates (page 26).

* * *

UNR, INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., and FOLDING CARRIER CORP.

By: /s/ Robert J. Penn
Robert J. Penn, President

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(page 28)

EXHIBIT F-1

Professor Francis McGovern's Proposed Claims Resolution Procedures

A. Introduction

* * *

All claims will be subject to careful scrutiny to ensure that the only claims paid are valid asbestos injury claims caused by exposure to UNR asbestos-containing products. Values for the claims will be based upon values established in the tort system considering all relevant factors (page 119).

* * *

E. Option 1: Cash Payment

Claimants shall have the option of making full and final settlement with the Trust in exchange for a single cash payment in an amount not to exceed $1,500. This option has been designed, among other reasons, for claimants who readily can be determined by the Trust to have a valid UNR Asbestos Disease Claim and who desire to have a fixed payment made expeditiously rather than a potentially higher, but delayed payment. In order to qualify for the exercise of this option, the claimant must make a conclusive demonstration of exposure to a UNR asbestos-containing product and submit a medical report from a qualified physician containing a diagnosis of an asbestos-related disease or injury.

* * *

F. Option 2: Individualized Resolution

The claimants shall have the option of receiving payments for valid claims in an individualized amount based upon the aggregation of claims into categories of similar cases with similar value, or based upon a more detailed individual examination of exposure, loss, injury and other characteristics. The Trustees may determine the common or individual characteristics of claimants that deserve payment because of their exposure to UNR asbestos-containing products and their asbestos-related injury, and organize those characteristics so that similar meritorious claims can be placed into categories or treated individually and resolved as expeditiously as possible (page 120).

* * *

EXHIBIT F-2

Plaintiffs' Committee's and Legal Representative's Proposed Trust Agreement Annexes Thereto

This Trust Agreement is among UNR Industries, Inc., Unarco Industries, Inc., UNR, Inc., UNR-Rohn, Inc. (Alabama) UNR-Rohn, Inc. (Indiana), Jobal Tube Co., Inc., UNR Products, Inc. and Folding Carrier Corp. (sometimes referred to collectively as " Debtors"), as Settlors, and _____ the Trustees pursuant to the _____ Amended and Restated Consolidated Plan of Reorganization of the Debtors dated _____, 1989 (the "Plan").

WHEREAS the Debtors are seeking to reorganize under the provisions of Chapter 11 of the United States Bankruptcy Code (the "Code"), and WHEREAS, the Debtors have filed the Plan, which provides, among other things, for the discharge of any liability the Debtors may have for debts to persons holding Asbestos-Disease Claims; and

WHEREAS, the Plan contemplates the creation of a trust, the assets of which will be used to resolve and satisfy all Asbestos-Disease Claims asserted against the Debtors.

NOW, THEREFORE, it is hereby agreed as follows: (page 123)

* * *

Article VII

General Provisions

* * *

7.02 *Termination*

* * *

(b) On the Termination Date, after payment of all of the Trust's liabilities have been provided for, all monies remaining in the Trust Estate shall be applied to such charitable purposes as the Trustees in their reasonable discretion shall determine which charitable purposes, if practicable, shall be related to the treatment of asbestos-caused disorders (page 128).

* * *

IN WITNESS WHEREOF, the parties have executed this Trust Agreement the day and year first above written.

SETTLORS

UNR Industries, Inc.
Unarco Industries, Inc.
UNR, Inc.
UNR-Rohn, Inc. (Alabama)
UNR-Rohn, Inc. (Indiana)
Jobal Tube co., Inc. (Page 130)
UNR Products, Inc.
Folding Carrier Corp.
TRUSTEES (page 131)

ANNEX B TO THE PROPOSED TRUST AGREEMENT

UNR ASBESTOS-DISEASE CLAIMS RESOLUTION PROCEDURES

A. Introduction

* * *

Under the Procedures, each member of the Asbestos-Disease Claims class must be treated equivalently in accordance with a series of claims resolution options. Claimants may choose among three different options for the liquidation and settlement of their claims: (1) an expeditious, but limited immediate flat payment, (2) immediate partial payment plus payment over time as money becomes available to the Trust or (3) a deferred claim. All claims will be subject to careful scrutiny to ensure that the only claims paid are valid asbestos injury claims caused by exposure to UNR asbestos-containing products. Values for the claims will be based upon values established in the tort system considering all relevant factors.

One very significant feature of the Procedures is that a claimant's right to a jury trial to liquidate the value of his claim shall be maintained. The liquidated value of any claim as determined by a jury or by any other method provided herein shall be for purposes of setting a value only. Claims so valued shall be paid in an amount as determined by the Trustees.

* * *

B. Purpose

The purpose of the Procedures is to provide fair payment to all persons with valid Asbestos-Disease Claims for personal injuries resulting from exposure to UNR asbestos-containing products, taking into account the basic principles of the tort system and the resources available to the Trust (page 134).

* * *

E. Option 1: Cash Payment

Claimants shall have the option of making a full and final

settlement with the Trust in exchange for a single cash payment in an amount not to exceed $1500. This option has been designed, among other reason, for claimants who readily can be determined by the Trust to have a valid UNR Asbestos-Disease Claim and who desire to have a fixed payment made expeditiously rather than a potentially higher, but delayed payment. In order to qualify for the exercise of this option, the claimant must make a conclusive demonstration of exposure to a UNR asbestos-containing product and submit a medical report from a qualified physician containing a diagnosis of an asbestos-related disease or injury.

* * *

F. Option 2: Individualized Resolution

The claimants shall have the option of receiving payments for valid claims in an individualized amount based upon the aggregation of claims into categories of similar cases with similar value, or based upon a more detailed individual examination of exposure, loss, injury and other characteristics. The Trustees may determine the common or individual characteristics of claimants that deserve payment because of their exposure to UNR asbestos-containing products and their asbestos-related injury, and organize those characteristics so that similar meritorious claims can be placed into categories or treated individually and resolved as expeditiously as possible.

* * *

In the event that there is no settlement between the Trust and a claimant for an Option 2 claim, either the claimant or the Trust may initiate, with the consent of the other party, engagement in other voluntary non-binding or binding alternative dispute resolution . . . (page 135)

* * *

In the event that the claim is not resolved by settlement or any alternative dispute resolution, the claimant may then proceed to file a lawsuit, if one has not already been filed, against the Trust to determine the value of his claim, to obtain discovery and proceed to trial. If a trial is sought, the right to a jury trial

shall be preserved with the defendant being the "UNR Asbestos-Disease Claims Settlement Trust" . . . All claims and defenses which exist under the law as elected by the claimant shall be available to both sides at trial.

CONSTITUTIONAL PROVISIONS AND STATUTES AND RULE INVOLVED

Article III of the U.S. Constitution provides, in pertinent part:

> Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Fifth Amendment of the U.S. Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Section 1334 (28 U.S.C. §1334) provides, in pertinent part:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11 . . . .

Section 157 (28 U.S.C. §157) provides, in pertinent part:

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> (b) (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
>
> (2) Core proceedings include, but are not limited to —
>
> (A) matters concerning the administration of the estate;
>
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
>
> * * *
>
> (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.
>
> * * *
>
> (5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c) (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

Section 1123 (11 U.S.C. §1123) provides, in part:

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall —

* * *

(5) provide adequate means for the plan's implementation such as —

(A) retention by the debtor of all or any part of the property of the estate;

* * *

(b) Subject to subsection (a) of this section, a plan may -

(3) provide for -

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

Section 524(e) (11 U.S.C. §524(e)) provides:

Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

Bankruptcy Rule 7012(b) provides, in part:

In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties.

Supreme Court, U.S.
FILED
MAR 12 1992
OFFICE OF THE CLERK

No. 91-1308

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (ALABAMA), UNR-ROHN, INC. (INDIANA), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., LEAVITT STRUCTURAL TUBING CO., and FOLDING CARRIER CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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March 12, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Respondents object to Petitioner's statement of the QUESTIONS PRESENTED FOR REVIEW and submit the following question as properly describing the only matter proposed for review:

Whether the United States Court of Appeals for the Seventh Circuit correctly interpreted Illinois state law in construing an insurance contract between UNR, the insured, and CNA, the insurer, when it held that UNR's transfer of 63% of its stock to asbestos claimants in a bankruptcy proceeding constituted a "judgment" or "settlement" under the applicable provisions of CNA's insurance contract?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1308

CONTINENTAL CASUALTY COMPANY,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Statement of Facts

UNR is a former asbestos manufacturer.[1] (App. 78a) By July 1982, as a result of its manufacture and distribution of asbestos products, UNR was a defendant in

---

[1] All Respondents are collectively referred to herein as "UNR." All Respondents' parents and subsidiaries have been named in the caption of this matter: UNR Industries, Inc., UNARCO Industries, Inc., UNR, Inc., UNR-ROHN, Inc. (Alabama), UNR-ROHN, Inc. (Indiana), Jobal Tube Co., Inc., UNR Products, Inc., Leavitt Structural Tubing Co., and Folding Carrier Co. All references to appendix are to the appendix supplied by Petitioner.

12,000 or so lawsuits involving asbestos-related injuries. (App. 4a) Faced with crushing asbestos liabilities, UNR filed for protection under Chapter 11 of the Bankruptcy Code in July 1982. (App. 4a) By February 21, 1989, approximately 105,000 asbestos-related claims had been asserted against UNR. (App. 4a) Damages sought by these asbestos claims exceeded $38,000,000,000.

During UNR's reorganization, insurance coverage actions between UNR and its insurers were filed as adversary proceedings and were later withdrawn by the district court. *UNR Indus., Inc.* v. *Continental Ins. Co.*, 607 F. Supp. 855, 858 (N.D. Ill. 1984). (App. 84a) The dispute in the insurance coverage actions was whether the insurance companies were required to pay for UNR's liability to the 105,000 or so asbestos claimants. After protracted litigation in the district court, including trial, UNR settled with nine of its insurers (App. 2a), leaving just one insurer that continued to ignore its contractual obligations, the Petitioner Continental Casualty Company ("CNA").[2]

UNR emerged from reorganization on June 2, 1989, having spent almost seven years under court supervision fashioning a reorganization plan. (App. 74a) UNR's reorganization was made possible only by the settlement of the approximately 105,000 asbestos claims. In a nutshell, UNR settled the 105,000 asbestos claims for $254,000,000. This arms-length settlement came only after seven years of adversary proceedings over UNR's present and future liability to the asbestos claimants. CNA did not object to UNR's settlement of these claims, although it had the plenary opportunity to do so.

---

[2] In the Seventh Circuit, UNR's appeal as to two other insurers arose from policies that could not be located, and involved issues distinct from CNA. UNR's claims as to these two carriers were settled post-appeal and are not at issue here.

As is typical in reorganization proceedings, because UNR did not have sufficient cash or other readily liquid assets to pay the asbestos claimants the amount of the settlement with them, UNR satisfied its settlement obligations to the asbestos claimants by transferring some 63% of its own common stock to the 105,000 asbestos claimants. The mechanism for investing, managing, and distributing funds to the individual asbestos claimants is an entity entirely separate from UNR, the UNR Asbestos-Disease Claims Trust (the "Trust"). In essence, UNR paid over the settlement reached with the asbestos claimants to the Trust, which in turn became obligated to invest, manage, allocate and disburse the settlement proceeds to the 105,000 asbestos claimants. (App. 83a) In June 1989, upon confirmation of UNR's reorganization, approval of this settlement and entry of judgment on the settlement, the Trust received 29,437,004 shares (approximately 63%) of UNR's common stock. (App. 85a) UNR thereupon received an unconditional release for all pending and future asbestos personal injury claims. (App. 83a)

Petitioner CNA issued UNR an Umbrella Excess Third Party Liability Policy, No. RDU 8062037, for the period November 1, 1970 to November 1, 1973 (the "CNA Policy"). (App. 4a) The CNA Policy provides UNR with $5,000,000 of insurance annually for three policy years, for a total of $15,000,000 in comprehensive excess coverage. (App. 4a) The CNA Policy provides that CNA "will indemnify [UNR] for loss in excess of the total applicable limits of underlying insurance." (App. 4a, CNA Policy, "Coverage," ¶ 1) The CNA Policy defines "loss" as "the sums paid as damages in *settlement* of a claim or in satisfaction of a *judgment*." (App. 4a, CNA Policy, "Definitions") (emphasis added) The CNA Policy further provides—in explicit language—that UNR's bankruptcy does not relieve CNA of any insurance obligation. (App. 5a)

Statement of Proceedings

In the district court, UNR contended, and CNA disputed, that the CNA Policy provides insurance coverage for the asbestos claims faced, and ultimately resolved, by UNR. CNA and UNR filed cross-motions for summary judgment arguing their respective interpretations of the CNA Policy. (App. 23a) In its motion, UNR submitted that its payment to the Trust constituted a "judgment or settlement" under the terms of the CNA Policy, thereby invoking CNA's insuring obligations. (App. 24a) Ruling against UNR and in favor of CNA, the district court held that "[t]he transaction by which UNR has conveyed or will convey 63% of its stock to the trust is not a judgment or settlement within the meaning of the CNA policy." (App. 24a) Based on this holding, the district court concluded that "[n]either UNR nor the trust has yet established a basis for excess liability coverage from CNA." (App. 24a) The district court dismissed UNR's complaint against CNA for lack of justiciability. (App. 25a)

On appeal, the Seventh Circuit reversed and remanded for trial on the merits. Applying Illinois law, the Seventh Circuit held (i) that UNR's obligation to transfer stock in satisfaction of the asbestos claims arose upon final confirmation of the reorganization plan; (ii) that the satisfaction of the asbestos claims constituted an "adverse judgment or settlement"; (iii) that in this case the characterization of the payment to the Trust as either a settlement or a judgment was immaterial; and (iv) that this judgment or settlement constituted a "loss," as a matter of law, within the meaning of the CNA Policy language. (App. 4a-5a) Accordingly, based on CNA's contractual language, the Seventh Circuit held that the nature and extent of CNA's insuring obligations were ripe for adjudication by the district court. The Seventh Circuit further determined that the amount of the "loss" to UNR ($254,000,000, representing the amount of the

settlement with the asbestos claimants) was fixed by the arms-length adversary proceedings before the bankruptcy court and that CNA could not later collaterally attack the amount of the settlement. (App. 5a-6a) CNA was at all times aware of UNR's asbestos claims; could have participated in UNR's settlement discussions with the asbestos claimants; and could have challenged the amount and propriety of UNR's settlement with the asbestos claimants had CNA exercised its option to defend these claims. (App. 6a; 7a)

The Seventh Circuit rejected CNA's pinched view of its Policy and its obligations for the asbestos claims settlement and resulting judgments. In most pertinent part, the appellate court examined the "No-Action" clause of the CNA Policy and determined that it did not preclude coverage.[3] (App. 4a) Construing this "No-Action" provision in accordance with Illinois law, the Seventh Circuit held that the nature and scope of "loss" resulting from UNR's plan of reorganization was binding upon CNA as a a"judgment," in which case the amount was finally determined by the plan (App. 5a), or as a "settlement," in which case, under Illinois law, CNA had waived its right to enforce the clause. (App. 6a-7a)

Having construed CNA's policy language to encompass the judgment and settlement effectuated by UNR with the asbestos claimants, the Seventh Circuit remanded the case to the district court for trial, including an adjudication and allocation of CNA's insuring obligations in accordance with Illinois law pursuant to *Zurich Ins. Co.* v. *Raymark Industries, Inc.*, 118 Ill.2d 23, 514 N.E.2d 150 (1987). (App. 15a) The case is currently proceeding in discovery on remand before the district court.

---

[3] The "No-Action" provision states that "[n]o action shall lie against [CNA] unless . . . the amount of [UNR's] obligation to pay shall have been finally determined either by judgment against [UNR] or by written agreement of [UNR], the claimant, and [CNA]."

SUMMARY OF ARGUMENT

CNA's position is preposterous. All that the Seventh Circuit did was to send the contractual dispute between CNA and UNR to trial in the district court. CNA has not been deprived of any right, due process or otherwise, and it is free to attempt to prove that it has no insuring obligation to UNR. Contrary to CNA's myopic suggestions, the *only* thing that the bankruptcy court did was to estimate and allow claims and approve the settlement between UNR and the asbestos claimants in the course of passing on UNR's successful Chapter 11 plan of reorganization. Estimating and allowing claims, approving settlements among creditors and debtors, and supervising and adopting reorganization plans all fall squarely within the function of the bankruptcy court. CNA's argument, if accepted, would in essence remove the bankruptcy court's ability to approve settlements of tort claims. Restructuring the Bankruptcy Code in such a fashion is neither necessary nor appropriate, especially because CNA remains free to adjudicate the extent of its contractual obligations to UNR.[4]

Moreover, this is purely a contract case. The Seventh Circuit applied settled state law in interpreting a single commercial liability insurance policy between UNR, the insured, and CNA, the insurer, in the context of an asbestos-related insurance dispute. (App. 3a-7a) The Seventh Circuit's opinion (i) did *not* conflict with the decision of another United States court of appeals on the same matter, (ii) did *not* conflict with a state court of last resort, and (iii) did *not* depart from the accepted and usual course of judicial proceedings. Rule 10. CNA's mischaracterizations notwithstanding, there

[4] The Seventh Circuit merely reversed the district court's dismissal of UNR's action against CNA, holding that the settlement between UNR and the asbestos claimants confirms that there is a present and justiciable breach of contract dispute over CNA's obligation to pay for part of the settlement. Indeed, it could readily be contended that CNA's Petition to this Court is not ripe since CNA has not yet been found liable to UNR.

is no federal issue presented by this petition—under the Bankruptcy Code, under any other federal law or under the Constitution—and none of the abstract, hypothetical or analytically dysfunctional questions posed by CNA is properly presented for review, especially at this point in the litigation. (CNA's Petition for Writ of Certiorari, p.i.) The Seventh Circuit's decision was limited to an interpretation of insurance policy language, applying traditional contract principles and applicable state law, in the context of a private contract dispute. The mere fact that this contract dispute arose in the context of a Chapter 11 proceeding has no bearing on the underlying nature of the dispute. And, of course, the Seventh Circuit did not finally or ultimately determine the full extent of CNA's contractual rights or obligations, but rather merely remanded the contractual dispute to the district court where it is still pending.

In sum, the Seventh Circuit's application of Illinois law in the interpretation of a private insurance contract does not raise any issue worthy of this Court's extraordinary jurisdiction, particularly given that Petitioner's insuring obligations are still in litigation.

ARGUMENT

I. THE SEVENTH CIRCUIT DID NOT IMPLICATE ANY FEDERAL LAW OR FEDERAL QUESTION IN INTERPRETING CNA'S INSURANCE POLICY

A. Under The Plain Language Of CNA's Policy And Consistent With Applicable Illinois Law, The Resolution Of UNR's Asbestos Liabilities Was A Judgment Or Settlement That Invoked CNA's Explicit Contractual Obligations

CNA issued excess comprehensive insurance to UNR. (App. 4a) Pursuant to this contract of insurance, CNA agreed to "'indemnify [UNR] for *loss* in excess of the total applicable limits of underlying insurance.'" (App. 4a; quoting CNA Policy, "Coverage," ¶ 1 (emphasis added)) CNA's Policy defines "*loss*" as "'the sums paid

as damages in *settlement* of a claim or in satisfaction of a *judgment*.'" (App. 4a; quoting CNA Policy, "Definitions" (emphasis added))

In the appeal below, focusing on this specific policy language, the Seventh Circuit was asked to determine whether UNR's transfer of stock to the Trust in resolution of asbestos liabilities constituted a "judgment" or "settlement," and therefore a "loss," that triggered CNA's insuring obligations. The court was further asked to determine whether the "No-Action" condition of CNA's Policy served to exclude coverage. Applying Illinois law and insurance policy construction principles, the Seventh Circuit interpreted the explicit language of CNA's Policy to cover UNR's loss. The court held that UNR's transfer of stock to the Trust in satisfaction of asbestos liabilities, and the confirmation of its reorganization proceeding, resulted in a "judgment or settlement" under the terms of the CNA Policy. Accordingly, the Seventh Circuit reasoned, UNR had suffered a "loss" that triggered CNA's insuring obligations. No federal question was raised or determined in interpreting the CNA Policy. (App. 4a-5a)

After determining that UNR had suffered a loss, the Seventh Circuit construed CNA's "No-Action" provision, which was CNA's principal argument for why coverage could not attach. The "No-Action" provision states that:

> "'[n]o action shall lie against [CNA] unless . . . the amount of [UNR's] obligation to pay shall have been finally determined either by judgment against [UNR] or by written agreement of [UNR], the claimant, and [CNA].'" (App. 6a; quoting CNA Policy, "Conditions," ¶ 7)

In rejecting CNA's interpretation of this provision, the Seventh Circuit held that the plan of reorganization was either a judgment or a settlement under the terms of the CNA Policy. (App. 4a) If the confirmation of the plan were deemed to be a judgment, reasoned the court, then the No-Action clause would, by its own terms, permit an

action. Alternatively, if the confirmation of the plan were deemed to be a settlement, then, as noted by the Seventh Circuit, the No-Action clause would appear "on its face" to bar suit against CNA because CNA was not a party to the confirmation plan. (App. 6a) However, the Seventh Circuit held that the No-Action clause would not bar a suit against CNA even if the confirmation were a settlement because, *pursuant to Illinois law*, CNA had waived application of the clause. The critical language from the opinion is as follows:

> "We have not found any Illinois cases dealing with an excess insurer's obligations to participate in settlement so as to avoid waiver of its 'no action' rights. On the facts of the present case, however, we are confident that an Illinois court would hold CNA's 'no action' clause waived." (App. 6a-7a)

The court supported its interpretation of Illinois law by discussing Illinois state cases (App. 7a) and federal cases applying Illinois law. (App. 6a)

The court further considered and rejected CNA's contention that the amount of the loss should equal the amount of "money the Trust actually pays to asbestos victims." (App. 5a) Noting that Illinois law specifically requires a contract of insurance to contain a clause stating that "'[b]ankruptcy . . . of the insured . . . shall not relieve [CNA] of any of its obligations'" (*see* Ill. Rev. Stat., ch. 73, § 1000), the Seventh Circuit held that UNR's loss should be measured by the "valuation of the asbestos claims" prior to the "discounting of the asbestos victims' damages" made necessary by the bankruptcy filing. (App. 5a-6a)[5] This holding was premised entirely upon CNA's policy provisions, Illinois statutory authority, and settled insurance coverage law. The Sev-

[5] The court also cited *Harbor Ins. Co.* v. *Continental Bank Corp.*, 922 F.2d 357, 368 (7th Cir. 1990), for the proposition that *under Illinois law* "'[t]he point of [liability] insurance policies . . . [is] to eliminate the very solvency risk' that would lead to a settlement limited by the amount of the insured's assets." (App. 5a-6a)

enth Circuit did not rely on bankruptcy or other federal law.

B. CNA's Characterization Of The Seventh Circuit's Decision As Addressing Federal Questions Is Fundamentally Flawed And Its So-Called "Authorities" Are Inapposite

In a transparent attempt to create a federal issue where none exists, Petitioner contends that the Seventh Circuit's interpretation of a commercial liability insurance policy somehow implicates sweeping principles of federal bankruptcy law. (CNA Petition, pp. 12-13) In point of fact, however, the Seventh Circuit simply did what courts of law have done for centuries: it examined disputed contractual language, interpreted the language according to applicable state law, and construed the rights and obligations of the contracting parties. The Seventh Circuit itself framed the scope of its ruling as follows:

> "The threshold question is whether UNR has suffered any 'loss' under [CNA's Policy] provisions. It has. UNR's bankruptcy resulted in a judgment or settlement (which one does not matter) against UNR in the amount of $254 million on the asbestos claims." (App. 4a)

The Seventh Circuit did nothing more than interpret the words "judgment" or "settlement" in the CNA Policy so as to include a transfer of assets effectuated in a bankruptcy reorganization. The court did not hold, or even discuss, whether federal bankruptcy law superseded Illinois contract law or otherwise affected the CNA Policy language.[6]

CNA asserts a contorted description of the Seventh Circuit's opinion to create the illusion that this case

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[6] Indeed, both parties briefed the case as a matter of state law before both the district court and the Seventh Circuit. CNA was certainly content to rely on Illinois state law in seeking to uphold the district court's original ruling, and its *post-hoc* attempt to transform a contract case into a federal matter must be rejected.

presents federal issues under *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and its progeny. However, CNA never even cited *Northern Pipeline* in its briefs to the Seventh Circuit or in its petition for rehearing. Quite obviously, the federal issues set forth in CNA's Petition are an afterthought, having never been presented to the Seventh Circuit for its consideration nor ruled upon in the courts below. When the Seventh Circuit's decision is properly viewed as involving the interpretation of an insurance contract under state law, Petitioner's "Rube Goldberg" characterization crumbles.

CNA's fanciful *Northern Pipeline* argument is based entirely on fundamental mischaracterizations of the Seventh Circuit's opinion, the record below, and applicable principles of Illinois law. (CNA Petition, pp. 12-19) As a starting point, in UNR's reorganization, the bankruptcy court did precisely what it is statutorily mandated to do: it effectuated the orderly satisfaction of claims against UNR in light of UNR's limited proceeds. *See Girardier* v. *Webster College*, 563 F.2d 1267 (8th Cir. 1977); *see also Burlingham* v. *Crouse*, 228 U.S. 459 (1913). One of many claims satisfied in the proceeding was UNR's asbestos liabilities.

Contrary to CNA's arguments—and fatal to its *Northern Pipeline* dreams—the Seventh Circuit did not expand the bankruptcy court order to effect any change in CNA's Policy language or CNA's insuring obligations. In fact, CNA's insuring obligations are currently being tried on remand before the district court. The Seventh Circuit simply held—and properly so—that the reorganization confirmation order imposed a binding obligation on UNR with respect to the asbestos claims and that CNA was bound *by its contract* to recognize the satisfaction of UNR's asbestos liabilities as a "judgment or settlement" in accordance with its own policy terminology. The bankruptcy court did not determine CNA's insuring obligations as petitioner argues; it determined the

nature and extent of UNR's liabilities vis-a-vis the asbestos claimants, which is precisely what a bankruptcy court must do. The determination of UNR's liability is all that is binding on CNA—nothing more, nothing less.

CNA's argument that the withdrawal of the insurance coverage litigation from the bankruptcy court immunized the carrier from a bankruptcy court ruling on UNR's asbestos liabiilties is nonsensical.[7] At the conclusion of UNR's seven-year reorganization, the bankruptcy court entered a confirmation order that was binding on the debtor, UNR. 11 U.S.C. § 1141(a). It was a binding order on UNR that resulted in a "judgment or settlement" for purposes of triggering CNA's insurance obligations. (App. 5a) The bankruptcy court made no ruling regarding CNA's insuring obligations; it properly resolved UNR's liability to the asbestos claimants, which it had the right and obligation to do. Similarly, the Seventh Circuit did not expand in any way the effect of the bankruptcy order; it properly interpreted CNA's policy language to respond to UNR's loss in the bankruptcy proceeding. The extent of CNA's actual insuring obligations, in light of UNR's asbestos liabilities, is now before the district court on remand.

Moreover, CNA's argument that the bankruptcy court somehow overstepped its authority by estimating the value of UNR's asbestos liabilities is similarly unavailing. The bankruptcy court did precisely what it was legislatively empowered and required to do under 28 U.S.C. § 157(b)(2)(B), which was to estimate UNR's asbestos liability for purposes of confirming a plan. *See A.H. Robins, Co.* v. *Piccinin*, 788 F.2d 884, 1012-14 (4th Cir. 1986),

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[7] CNA did not object to the district court keeping this case when it had an opportunity to do so (*UNR Indus. Inc.* v. *Continental Ins. Co.*, 623 F. Supp. 1319, 1331 (N.D. Ill. 1985)), and chose not to participate in the bankruptcy proceeding (App. 6a). Accordingly, CNA's protestations as to the forum it selected to resolve coverage obligations provides no solace.

cert. denied, 479 U.S. 876 (1986); *In re UNR Industries, Inc.*, 45 Bankr. 322, 326 (N.D. Ill. 1984); *In re Johns-Manville Corp.*, 45 Bankr. 823, 825-26 (S.D.N.Y. 1984). The effect on CNA of the bankruptcy court's estimation does not arise from abuse of federal powers, but from CNA's own Policy language that requires the insurer to cover "settlements or judgments."

It is hornbook insurance law that where an insurer denies coverage to its insured, it is thereafter bound by reasonable settlements entered by the insured. The fact that UNR settled its asbestos liabilities in the context of a bankruptcy proceeding does not change this principle. CNA is bound by the resolution of UNR's asbestos liability, not because of overreaching court rulings, but because of its policy language and its refusal to honor its policy obligations.[8]

Petitioner's consent or waiver argument is also erroneously premised. The Seventh Circuit did not, as CNA argues, hold that "CNA's failure to object to or appeal from the confirmation order resulted in a binding determination and a waiver of any objections." (CNA Petition, p. 15) Rather, the court found that the reorganization imposed a binding liability on UNR and, under the settled state law principle of insurance law discussed above, CNA could not relitigate UNR's liability. (App. 5a) When properly viewed, the federal cases cited by petitioner purporting to demonstrate a "conflict" in the lower courts (CNA Petition, pp. 16-17) have no relevance to the Seventh Circuit's rulings. None of the cases relied upon by CNA involves a situation where, as here, an

[8] The following is a sampling of cases applying the well-settled insurance law that a liability insurance carrier, like CNA, is bound by its insured's reasonable settlement of a liability claim when the carrier disputes coverage. *See, e.g., Luria Bros. & Co.* v. *Alliance Assur. Co., Ltd.*, 780 F.2d 1082, 1091-92 (2d Cir. 1986); *Maneikis* v. *St. Paul Ins. Co. of Illinois*, 655 F.2d 818, 827 (7th Cir. 1981); *Uniroyal, Inc.* v. *Home Ins. Co.*, 707 F. Supp. 1368, 1378-79 (S.D.N.Y. 1988). *See also* App. 6a-7a.

insurance carrier was *contractually bound* to pay a judgment or settlement entered in a reorganization proceeding.[9] Accordingly, there is no conflict.

Petitioner's preclusion and estoppel argument likewise misconstrues the Seventh Circuit's opinion. The Seventh Circuit did not hold, as CNA contends, that the reorganization plan or the confirmation order had "preclusive effect" as to CNA. (CNA Petition, pp. 18 and 21-23) Rather, the court held that, under the terms of the CNA Policy, the bankruptcy reorganization constituted a "judgment or settlement" triggering CNA's obligations. (App. 5a-6a) CNA is bound by this "judgment or settlement" not because of bankruptcy court power, but because of its Policy language and CNA's denial of coverage. Predictably, therefore, none of the cases cited by CNA even involved an insurance contract, much less whether an

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[9] *In re Brickell Invest. Corp.*, 922 F.2d 696, 702 (11th Cir. 1991) (bankruptcy court lacks power in non-core cases to make award of attorneys fees under I.R.S. § 7430 absent consent under 28 U.S.C. § 157(c)(2)); *United States Dept. of Air Force* v. *Carolina Parachute Corp.*, 907 F.2d 1469, 1473 (4th Cir. 1990) (confirmation order *res judicata* as to parties to proceeding); *In re Davis*, 899 F.2d 1136, 1142 (11th Cir. 1990) (bankruptcy court lacks power in non-core cases to make award of attorneys fees under Equal Access to Justice Act absent consent under § 157(c)(1)), *cert. denied sub nom., Gower* v. *Farmers Home Admin.*, 111 S.Ct. 510 (1990); *Latham* v. *Wells Fargo Bank N.A.*, 896 F.2d 979, 984 (5th Cir. 1990) (bankruptcy court decision regarding settlement of lender liability claim not res judicata as to independent lender liability claim of co-borrower guarantor); *In re Men's Sportswear, Inc.*, 834 F.2d 1134, 1137-38 (2d Cir. 1987) (consent to non-core proceeding inferred from active participation in and failure to object to ongoing proceedings involving breach of licensing agreement); *In re Daniels-Head & Associates*, 819 F.2d 914, 917-18 (9th Cir. 1987) (appellant filed state law contract claim in bankruptcy court and thereby consented to the exercise of its jurisdiction); *In re Southern Indus. Banking Corp.*, 809 F.2d 329, 331 (9th Cir. 1987) (party who participated without objection in bankruptcy court proceedings regarding obligation to pay on a note and possible set-off had consented to the exercise of bankruptcy court's jurisdiction).

insurer's obligations were triggered by "judgment or settlement." Accordingly, for purposes of this case, it is simply irrelevant whether a confirmation order is treated as a consent decree [10] or whether a confirmation order contains any findings of fact. (CNA Petition, pp. 22-23) The confirmation order did not bind or purport to bind CNA; CNA is bound solely by its own insurance contract, its own conduct, and settled principles of state insurance law.

Petitioner's due process argument fails for similar reasons. Contrary to CNA's contentions, the Seventh Circuit did not hold that the confirmation order was binding upon CNA because of the application of *res judicata* or because of a bankruptcy rule. (CNA Petition, pp. 19-20) Rather, the Seventh Circuit held that the order was binding upon UNR and therefore UNR had suffered a "loss" as defined by CNA's Policy. (App. 5a) CNA's insuring obligations were not established by the bankruptcy court order, but by the terms of its insurance contract. The cases cited by Petitioner (CNA Petition, pp. 20-21) are again wide of the mark since none involved an insurance contract obligation. They involve, instead, the issue of whether the confirmation plan of its own force has preclusive effect independent of contractual obligations.[11]

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[10] *Paul* v. *Monts*, 906 F.2d 1468 (10th Cir. 1990), *In re Stratford of Texas, Inc.*, 635 F.2d 365 (5th Cir. 1981).

[11] *In re Howe*, 913 F.2d 1138, 1144-46 (5th Cir. 1990) (lender liability suit arising out of loan transaction barred by res judicata where same loan transaction was subject of prior bankruptcy court proceedings between same parties and was included in confirmed plan); *In re Auto West, Inc.*, 43 Bankr. 761, 764 (D. Utah 1984) (confirmation of plan does not prevent trustee from pursuing through subsequent litigation undisclosed assets of the estate); *Coral Gables First Nat'l Bank* v. *Constructors of Florida, Inc.*, 299 F.2d 736, 740 (5th Cir. 1962) (bankruptcy court had power to permit claims to be adjudicated in state court pursuant to plan of reorganization).

In sum, the Seventh Circuit did not construe the Bankruptcy Code or apply federal law in reaching its conclusions; it properly relied on the law of Illinois, and interpreted the CNA Policy in accordance with that law. (App. 3a) Nothing in the Seventh Circuit's interpretation of Illinois law or of the CNA Policy warrants this Court's review.

II. THERE REMAINS A CASE OR CONTROVERSY BETWEEN CNA AND UNR, AND IT IS PROCEEDING TOWARD TRIAL IN THE DISTRICT COURT

Petitioner's final contention is that the suit between CNA and UNR is premature (CNA Petition, p. 24), and that unless UNR identifies individual claims covered by the CNA Policy, there is no case or controversy. (CNA Petition, p. 26) This contention, however, was properly rejected by the Seventh Circuit. (App. 9a-10a)[12] The case or controversy between UNR and CNA is proceeding toward trial in the district court, where it belongs.

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[12] At the suggestion of the Seventh Circuit (App. 3a n.1), Respondents filed on December 16, 1991, a Fourth Amended and Supplemental Complaint. On January 27, 1992, CNA filed a motion in the district court to dismiss this complaint for lack of federal subject matter jurisdiction. It is sophistic in the extreme for CNA to argue that federal questions of constitutional significance are at issue in this Petition while simultaneously challenging federal jurisdiction below.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition For a Writ of Certiorari.

Respectfully submitted,

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No. 91-1308

In The Supreme Court of the United States October Term, 1991

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (ALABAMA), UNR-ROHN, INC. (INDIANA), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., LEAVITT STRUCTURAL TUBING CO., and FOLDING CARRIER CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF

Contrary to respondents' assertion, the Seventh Circuit's decision does not merely present state law issues construing an insurance contract, but raises important federal and constitutional questions.

Respondents argue that the Seventh Circuit did not expand the bankruptcy court order to effect any change in the contract language or the insurer's obligations under its policy. That is incorrect because both the reasoning of, and the result reached by the Seventh Circuit depend upon its holding that petitioner — which was not a party nor a creditor in the bankruptcy

proceedings — is bound by the bankruptcy court's estimation of the aggregate value of all personal injury tort claims against respondents.

If all the Seventh Circuit had done was to interpret contract language in the context of an order confirming a reorganization plan, it would have gone no further than to hold that the bankruptcy order was a "settlement or judgment." However, the decision did not stop there.

By taking the next step, in holding that petitioner was bound by the estimated value of all personal injury tort claims (as augmented by the Seventh Circuit),[1] it improperly expanded the effect of the bankruptcy court's confirmation order. This holding then raises the questions presented in the petition including, *inter alia*: 1) whether a bankruptcy court has jurisdiction under Article III and the Bankruptcy Code to issue an order which binds a person who is not a creditor of the debtor nor a party to the bankruptcy proceedings and did not consent to jurisdiction; and 2) whether such persons can be bound to an estimation of value of personal injury tort claims which is not an adjudicated fact even as to respondents and their creditors.

The Seventh Circuit introduced these jurisdictional issues by its decision. Contrary to respondents' assertion (Brf. at 11),

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[1] The bankruptcy court never estimated the "real value" of the personal injury tort claims to be $254.0 million. That computation first appeared in the Seventh Circuit opinion in this case, and was based on an extrapolation by the Seventh Circuit from a formula which UNR negotiated with its creditors (App. 6a).

Respondents' position before the district court was that the stock was worth $130.0 million (Doc. 2059 (UNR Reply Memo in Support of SJ) p. 1, the "reorganization imposes a legal obligation on UNR to transfer into trust over $130 million in stock in settlement of the asbestos-disease claims").

Respondents' position in the Seventh Circuit was that the value of the stock had increased by $20.0 million (UNR Reply Brf. at 4, "UNR's transfer of more than $150 million in stock unquestionably qualifies for reimbursement under the CNA policy").

The Seventh Circuit then increased the latter amount by $104.0 million and made a finding of fact that this $254.0 million was the "real value" of the personal injury tort claims transferred to the trust for resolution (App. 6a).

petitioner addressed these issues at the first opportunity, in its petition for rehearing (Pet. Reh. at 1, 3-4, 9).[2]

Respondents correctly assert that the circuit court decisions which conflict with the Seventh Circuit's do not involve insurance contracts (Brf. at 13-14 n. 9). The constitutional and statutory limitations on bankruptcy jurisdiction do not evaporate simply because an insurance contract is involved.

Respondents misconstrue petitioner's argument by claiming that petitioner is challenging a bankruptcy court's right to estimate and allow claims, approve settlements among creditors and debtors, and supervise and adopt reorganization plans (Brf. at 6, 12). Of course these are functions of a bankruptcy court, and petitioners never challenged them. However, a bankruptcy court may not issue final orders estimating the value of personal injury tort claims that bind a debtor's debtor (or, in this case, a potential indemnitor) which is not a party nor creditor, and which did not consent to bankruptcy jurisdiction.

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[2] For example, one of the suggestions for rehearing in banc was: "May the bankruptcy court determine the value of bodily injury claims over which it does not have jurisdiction and bind a non-party, the insurer of the debtor?" (Pet. Reh. at 1).

CONCLUSION

For these reasons and the reasons in the petition, petitioner Continental Casualty Company respectfully requests this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on August 29, 1991 and the denial of the petition for rehearing entered on October 3, 1991.

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